Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL SKAKEL,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ Of Certiorari to the Supreme Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stogner v. California*, 539 U.S. 607 (2003), this Court held that a state law authorizing a prosecution that the passage of time had previously barred violates the Constitution's Ex Post Facto Clause. This Court's cases have held that the Due Process Clause prevents the judicial branch from achieving, through a legal interpretation both unexpected and indefensible by reference to the law previously expressed, that which the legislative branch may not achieve under the Ex Post Facto Clause. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001). In order to authorize a prosecution of petitioner, the Connecticut Supreme Court needed to overrule two of its prior unanimous decisions under which the limitations period had expired almost 20 years before the case was brought.

The question presented is whether a State violates the Due Process Clause of the Fourteenth Amendment when its highest court unexpectedly overrules its own binding interpretation of one of its statutes in order to authorize a criminal prosecution that the passage of time had previously barred.

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Skakel respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Connecticut affirming petitioner's conviction is reported at 888 A.2d 985. Pet. App. 1a. The court's order denying petitioner's motion for reconsideration, to reargue and for reconsideration and reargument en banc is unreported. Pet. App. 158a.

JURISDICTION

The Supreme Court of Connecticut entered its judgment on January 24, 2006. It then denied petitioner's timely motion for reconsideration, to reargue and for reconsideration and reargument en banc on March 14, 2006. On May 25, 2006, Justice Ginsburg extended the time to file a petition for writ of certiorari to and including July 12, 2006. *See* Application No. 05A1084. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

Article I of the Constitution provides, in relevant part: "No State shall . . . pass any . . . ex post facto Law[.]" U.S. Const. art. I, § 10.

Conn. Gen. Stat. § 54-193 (Rev. to 1975) provided at the time of the offense: "No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal

law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed . . . ."

Conn. Gen. Stat. § 54-193, as amended in April 1976, provided: "No person shall be prosecuted for any offense, except a capital felony or a class A felony for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed; nor shall any person be prosecuted for any other offense, except a capital felony or a class A felony, but within one year next after the offense has been committed . . . . There shall be no limitation of time within which a person may be prosecuted for a capital felony or a class A felony."

Conn. Gen. Stat. § 53a-54a (Rev. to 1975) provided in relevant part: "(c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a."

The relevant statutory provisions are reproduced in full at Pet. App. 162a.

STATEMENT OF THE CASE

This case presents a due process issue of exceptional importance implicating the right of every citizen to receive fair warning of when a prosecution may be brought. The Connecticut Supreme Court authorized a criminal prosecution of petitioner that the passage of time had previously barred. It did so by applying to his case a state statute that eliminates limitations periods for certain offenses, after having ruled twice in the previous 23 years that the statute does *not* apply to offenses, such as the one here, that pre-dated its enactment.

The offense of which petitioner was convicted—non-capital murder—occurred in 1975. At that time, the limitations period for such offenses was five years. In 1976, one year *later*, the Connecticut legislature enacted a statute elimi-

nating the limitations period for certain offenses, including non-capital murder. Between 1980 and petitioner's arrest in 2000, the Connecticut Supreme Court twice held, each time *unanimously*, that the 1976 statute did not apply to *pre-enactment* conduct. But in this case, the court announced that it had changed its view on how to interpret the scope of the 1976 statute; it overruled the two prior decisions that had declared the statute operates prospectively only; and it applied the new interpretation retroactively to petitioner.

By applying that new unexpected interpretation retroactively, and reviving a prosecution that had been barred for the previous 25 years, the court violated petitioner's right to due process of law. This issue is of exceptional importance; if the Connecticut Supreme Court's decision is correct then no one may safely look to a judicial interpretation of a criminal statute for fair warning as to the meaning and scope of that statute, no matter how authoritative and definitive the ruling appears to be. Such a result strikes at the foundation of every person's right to due process under the law; it is contrary to the decisions of this Court; and it conflicts with multiple decisions from the federal courts of appeals and state courts of last resort.

1. Petitioner was arrested on January 19, 2000 for a crime that occurred nearly 25 years earlier, when he was 15 years old. Following his arrest he was charged with non-capital murder under Connecticut General Statutes 53a-54a, and his case was transferred from juvenile to adult court. At the time of the conduct of which petitioner was accused, Connecticut had a five-year limitations period for all felony offenses. Conn. Gen. Stat. § 54-193 (Rev. to 1975) ("No person shall be prosecuted . . . for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed").

Before trial, petitioner moved for dismissal on the ground that the five-year limitations period had expired in October 1980, more than 19 years before he was arrested.

His position was amply supported by two unanimous Connecticut Supreme Court decisions. The first, *State v. Paradise*, 456 A.2d 305, 306 (Conn. 1983), dismissed charges brought under the same murder statute, Conn. Gen. Stat. § 53a-54a (Rev. to 1975), because the action had not commenced until nearly eight years after the victim's death. The state's highest court first explained that because Section 53a-54a is a class A felony, 456 A.2d at 306, the limitations period under the statute in effect at the time of the offense—Conn. Gen. Stat. § 54-193 (Rev. to 1975)—was five years. 456 A.2d at 306-07. It then rejected the State's effort to take advantage of a new statute, enacted in April 1976, that eliminated the limitations period for capital and class A felonies. The court held that this newly expanded statute of limitations, "by its terms," did *not* apply to offenses pre-dating its enactment. *Id.* at 306 & 307. It therefore upheld dismissal of the charges on the ground that they were time-barred. Nine years later, the Connecticut Supreme Court reconsidered and unanimously reaffirmed its *Paradise* ruling in *State v. Crowell*, 636 A.2d 804 (Conn. 1994).

Despite those binding authorities holding that Section 54-193 "provided for a five-year period of limitations on *all* felony offenses," *Paradise*, 456 A.2d at 307 (emphasis added), the trial court concluded that the five-year period was inapplicable to the felony offense of non-capital murder. Pet. App. 28a. Under the trial court's reasoning, there had never been a limitations period for non-capital murder, even before the 1976 statute was enacted, and the *Paradise* interpretation of that statute had been wholly unnecessary. The case therefore proceeded to trial.

2. The evidence at petitioner's trial showed that on the night of October 30, 1975, 15-year-old Martha Moxley was bludgeoned to death near her family home in Greenwich, Connecticut. Her body was found at noon the next day. No physical evidence implicated petitioner in the murder. Instead, the State based its case on circumstantial evidence, presented largely through the testimony of persons who attempted to recall events that occurred more than a quarter

century earlier as well as those who recounted various statements allegedly made by petitioner, many of which were first mentioned to the authorities after the five-year limitations period had expired.

a. The State's medical examiner testified that the victim was killed with a golf club from a set that, according to witnesses, had belonged to petitioner's deceased mother, Pet. App. 5a-7a, and that the victim was likely attacked at the far end of her driveway and then dragged by her assailant to the location where she was later found—under a tree on a different part of her family's property. *Id.* The coroner found no traces of semen on the victim's body, Pet. App. 5a, and no blood or other forensic evidence linked petitioner to the crime.

In the absence of physical evidence connecting petitioner to the murder,[1] the prosecution built its case on a foundation of motive. According to the prosecution, petitioner had developed a romantic interest in the victim and became jealous upon observing her flirtations with petitioner's older brother, Tom Skakel, on the evening of the murder. Pet. App. 204a-206a, 233a.

b. Petitioner presented an alibi, but his ability to substantiate it at trial was seriously eroded by the prosecutorial delay. Moxley was last seen alive between 9:00 and 9:30 p.m. on October 30, standing in the driveway of the Skakel residence. A small group left the Skakel residence before 9:30 p.m. and drove twenty minutes away to the home of petitioner's cousin, James Dowdle, to watch a television program that aired at 10:00 p.m. Pet. App. 3a-4a. It is undisputed that Moxley and Tom Skakel remained outside the Skakel residence. *Id.* The State put on testimony that petitioner also stayed behind. Pet. App. 4a n.6. But several oth-

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[1] The defense presented evidence that members of the Skakel family habitually left golf clubs from the set to which the murder weapon belonged outside on their property, thus countering the inference that the murderer was someone with access to the Skakel house. Pet. App. 167a-168a.

ers recalled that petitioner left with the group for Dowdle's house, thus placing petitioner far from the scene when the crime was most likely committed.[2] *Id.* Although this account had been provided to the police in the fall of 1975, Pet. App. 206a-208a, 221a-223a, its force was weakened considerably by the inability of some of these witnesses to recall petitioner's whereabouts with certainty 25 years after the fact. *See* Pet. App. 169a-171a, 220a-221a, 223a-226a. The State took further advantage of the effects of its delay by arguing in its summation that petitioner's alibi had been fabricated by his family. Pet. App. 228a-234a.[3]

Petitioner also presented evidence pointing to Kenneth Littleton, who had just taken up residence with petitioner's family, as the assailant. Petitioner's ability to establish this defense was seriously compromised, however, when during the lengthy delay between the murder and trial the police misplaced a police sketch of an adult man seen by a security guard near the crime scene at the approximate time of the murder. *See* Pet. App. 62a-78a (discussing the State's failure to produce the drawing until after trial).

c. The remainder of the prosecution's case rested principally on witnesses who claimed petitioner had incriminated himself in the years following the crime. The most notable of these witnesses was Gregory Coleman, who had testified for the State at a pre-trial hearing but could not be cross-

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[2] The evidence pointed to 10:00 p.m. as the approximate time of the murder. For example, at least three witnesses heard a commotion or disturbance from the general vicinity of the murder scene at, or shortly before, 10 p.m. Pet. App. 6a n.7; *see, e.g.*, Pet. App. 168a-169a, 171a-172a (testimony by neighbor Helen Ix that her dog barked "violently" for twenty to thirty minutes at approximately 10 p.m. while standing in the middle of the road facing the area where Moxley's body was found).

[3] The Connecticut Supreme Court concluded that it was "reasonable" to posit such an effort by petitioner's family although the state's attorney "did not, and could not, point to any direct evidence of" it. Pet. App. 128a.

examined at trial because he died from a drug overdose between the pre-trial hearing and trial. The jury instead heard only a reading of Coleman's prior testimony, which Coleman had given while undergoing a heroin withdrawal so severe that he needed to go to the hospital after testifying. Pet. App. 192a-196a. Coleman had been an "enforcer" at the school for troubled youth that petitioner attended from 1978 to 1980. Coleman claimed that petitioner confessed his guilt while also boasting that he would escape the consequences because of his family connections. Pet. App. 183a. Coleman's account of petitioner's alleged confessions changed in subsequent retellings, *see, e.g.*, Pet. App. 184a-191a, 199a-203a; none of the individuals he identified as fellow witnesses to the confessions testified to corroborate his account; and the only witness who did provide testimony about the events recounted by Coleman contradicted Coleman's recollection. *Compare* Pet. App. 183a-184a, 196a-197a *with id.* at 182a-183a.

While the prosecution produced other witnesses who claimed to have heard petitioner admit involvement in the murder, these witnesses also had come forward with their accounts for the first time some twenty years after the crime, when it re-emerged as a prominent news story. Pet. App. 175a-182a. At the same time, key witnesses for the defense, including petitioner's father as well as the headmaster of the school where petitioner allegedly confessed to the murder, had lost most of their memory or had died in the almost 27 years between the date of the murder and the start of petitioner's trial.[4]

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[4] *See* Pet. App. 97a-101a (upholding trial court's admission of triple hearsay—in the form of prior grand jury testimony by Mildred Ix that petitioner's father had told her that petitioner admitted he may have committed the crime—after holding that both Ix's and petitioner's father's lack of recall of the statement made the admission of hearsay necessary); Pet. App. 172a-175a (testimony showing petitioner's father's inability to recall his children's names, the events of September 11, 2001, or the statement introduced through hearsay).

d. The State's substantial delay in arresting petitioner rendered him ineligible for adjudication as a juvenile, a disposition that would have substantially reduced his maximum sentence. At the time of the offense—and for nearly 20 years thereafter—Connecticut law prevented the transfer of a case such as his to adult court unless an investigation revealed, among other things, that there was no available state institution suitable for his placement. Pet. App. 23a-24a. In 1994, the agency responsible for detention and treatment of juveniles adopted a regulation prohibiting placement as a juvenile delinquent of anyone over the age of 18, thus "foreclos[ing] [petitioner's] adjudication in juvenile court." Pet. App. 24a.

The jury convicted petitioner. In August 2002 he was committed to state custody to serve a prison term of 20 years to life. Pet. App. 2a & n.2.

3. On appeal, petitioner argued *inter alia* that his prosecution violated Section 54-193's five-year limitations period for felony offenses. The State responded with a lengthy defense of the trial court's interpretation of that law—*i.e.*, the trial court's view that *Paradise* had been "unnecessary" because there had never been a limitation period for non-capital murder. In the final three paragraphs of its argument, the State included—as an alternative basis to affirm—a reprise of its unsuccessful request in *Crowell* that *Paradise* be overruled. Indeed, the State advanced no argument that would question the rules of statutory construction underlying *Paradise* and *Crowell*. Instead, it merely asserted that a defendant lacks a "vested right" in the limitations period in effect at the time of the offense, Pet. App. 258a—an assertion already *twice* dismissed by the Connecticut Supreme Court as beside the point. *See Crowell*, 636 A.2d at 806 ("We note, first, that this same 'vested right' argument was made by the state in *Paradise* and rejected by this court.")

The Connecticut Supreme Court affirmed. Notably, it did *not* uphold the trial court's interpretation of the limitations period in effect in 1975. Instead, "assum[ing], without deciding, that the five year limitation period of the pre-1976

amendment version of § 54-193 applies to murder," Pet. App. 33a n.31, the court announced for the first time that it was "persuaded" it had "wrongly decided" *Paradise* and that it now was "convinced" it is "far more likely that the legislature intended" for the 1976 amendment to apply to offenses "for which the preamendment limitation period has not expired." Pet. App. 32a.

The court decided to overrule *Paradise*, because—in its view—when the issue is whether the legislature intended that a new limitations period apply to "offenses for which the applicable preamendment statute of limitations period has not yet expired," the courts should not presume that the legislature intended prospective application only. In particular, the court deemed "illogical" its earlier unanimous decisions to characterize limitations statutes as "penal for purposes of determining the proper approach to their construction" because "such statutes inure to the *benefit* of criminal defendants." Pet. App. 42a. (emphasis in original) Recognizing that statutes of limitation are "designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past," Pet. App. 43a (quoting *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)), the court nonetheless perceived a conflict between strict construction of statutes of limitations and what it characterized as the "remedial nature of criminal statutes of limitation," which dictates that "they 'are to be liberally interpreted in favor of repose.'" Pet. App. 43a-44a (quoting *Toussie*).

The court also cited the Constitution's prohibition of *ex post facto* laws as a further basis for reversing Connecticut's longstanding presumption against retroactive application of a new criminal limitations period. That is, the court found it significant, in deciding what the legislature is presumed to *intend*, that it believed the Constitution *permits* a legislature to extend a limitations period for offenses not yet barred by the passage of time. Pet. App. 48a-49a. Having therefore abandoned the longstanding distinction under Connecticut

law between civil and criminal limitations periods, Pet. App. 50a, the court announced that it would now switch the presumption and assume that the legislature intends for criminal limitations periods to apply retroactively to offenses for which the preexisting limitations period had yet to expire. Pet. App. 49a. Because the language of the statute "sheds no light on whether the legislature intended" for it to have retroactive effect, and with "scant" legislative history on that score, the new presumption led the court to rule that the 1976 Act applied to petitioner's case. Pet. App. 55a.

4. Petitioner timely moved for reconsideration and reargument claiming, as relevant here, that application to him of the new unexpected interpretation of the 1976 law violated his rights under the Due Process and Ex Post Facto Clauses of the Constitution. The State opposed the motion arguing, in part, that the Due Process Clause's requirements of notice, foreseeability and fair warning come into play when the states "*attach[es] criminal penalties to what previously had been innocent conduct.*" Pet. App. 292a (emphasis in State's brief; quoting *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001)). The State contended that petitioner "cannot rely on" the *Paradise* decision, "coming eight years after he committed this murder, as having somehow misled him as to the criminality of his conduct." *Id.* The Connecticut Supreme Court denied the motion without opinion.

REASONS FOR GRANTING THE WRIT

The Due Process Clause's requirement that no State shall "deprive any person of life, liberty, or property, without due process of law," imposes on state courts many of the same restrictions that the Ex Post Facto Clause imposes on state legislatures. These two clauses ensure fundamental fairness, through notice and fair warning, and prevent arbitrary and vindictive use of the law. This Court has therefore held, with respect to the elements of a criminal offense, that a judicial construction of a statute may not be given retroactive effect if that construction is "'unexpected and indefensible by reference to the law which had been expressed prior to the

conduct in issue[.]'" *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citation omitted).

These same principles prevent the retroactive expansion of a limitations period by the judiciary after the previous limitations period has expired. As this Court held in *Stogner v. California*, 539 U.S. 607 (2003), a state legislature may not authorize criminal prosecutions that the passage of time had previously barred, because such a law "produce[s] the kind of retroactivity that the Constitution forbids[.]" *Id.* at 610. The retroactive application of such a law threatens "'manifestly *unjust and oppressive*'" effects, *id.* at 611, because it "'unfair[ly]'" and "'dishonest[ly]'" allows prosecution after the State has "assured 'a man that he has become safe from its pursuit,'" thus "depriv[ing] the defendant of the 'fair warning,' that might have led him to preserve exculpatory evidence." *Id.* (citation omitted). The Due Process Clause forbids a State from accomplishing the same unfairness through its judicial branch.

The Connecticut Supreme Court violated petitioner's due process rights. It held for the first time, 25 years after the limitations period applicable to the Moxley murder had expired, that a statute abolishing limitations periods for non-capital murder and other offenses could now be applied to petitioner. The court reached this result by overruling two of its own unanimous decisions, each of which had conclusively held that the newer limitations statute did *not* apply to offenses committed before April 1976. *See Paradise*, 456 A.2d 305; *Crowell*, 636 A.2d 804.

The Connecticut Supreme Court's new interpretation of the statute, based on nothing more than a reassessment of arguments it had twice recently rejected, was "unexpected and indefensible" by reference to the court's recently-announced dispositive rulings. Applying the new interpretation to petitioner is manifestly unjust and oppressive, and it unfairly and dishonestly allows prosecution after petitioner has been assured (and reassured) that he was safe from pursuit. As in

Stogner, the State's failure to play by its own rules violates the Constitution.

The Connecticut Supreme Court has therefore decided an important federal question in a way that conflicts with the relevant decisions of this Court. The Connecticut Supreme Court's decision also conflicts with decisions of the federal courts of appeals and at least one other state court of last resort on the issue whether a reversal of a recent dispositive and binding opinion on the same subject was unexpected and indefensible. If the Connecticut decision is accepted as a correct result under the Due Process Clause, no citizen will be allowed to claim a lack of fair warning when a court reverses its prior interpretation of a criminal statute, no matter how firm the prior interpretation. The petition should be granted to remedy these conflicts in decisions on this important federal question.

THE CONNECTICUT SUPREME COURT'S REVERSAL OF BINDING CASE LAW TO REVIVE A TIME-BARRED PROSECUTION VIOLATES DUE PROCESS AND CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

A. The Due Process Clause Forbids Retroactive Expansion Of A Limitations Period To Permit A Prosecution That The Passage Of Time Had Previously Barred.

1. The Due Process Clause of the Fourteenth Amendment, like the Ex Post Facto Clause of Article I, guarantees fundamental fairness and prevents the arbitrary and vindictive use of the laws. In particular, the Due Process Clause prevents courts from expanding criminal statutes retroactively, just as the Ex Post Facto Clause proscribes the enactment of laws that seek to accomplish the same end.[5] As this

[5] Article I contains two Ex Post Facto Clauses, which apply the same prohibitions, one at the federal level and the other at the state level. Section 9 of Article I, which governs Congress, states that

Court recognized more than 200 years ago in *Calder v. Bull*, 3 U.S. (Dall.) 386, 390-91 (1798), the Ex Post Facto Clause prohibits the following four categories of legislative actions:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

See also Collins v. Youngblood, 497 U.S. 37, 46 (1990) (recognizing the authoritativeness of the *Calder* description of ex post facto laws). These four categories of laws are "manifestly unjust and oppressive." *Calder*, 3 U.S. at 391.

This Court has routinely found that the retroactive application of statutes in a manner described above violates the Constitution's prohibition on ex post facto laws. *See, e.g., Carmell v. Texas*, 529 U.S. 513 (2000) (holding that the retroactive application of an amendment to the criminal procedure code reducing the amount of corroborating evidence required for conviction of a sexual offense violated the Ex Post Facto Clause). That prohibition against ex post facto laws also extends to statutes, enacted after a limitations period has expired, "authoriz[ing] criminal prosecutions that the passage of time had previously barred." *Stogner*, 539 U.S. at 610. Thus, in *Stogner* this Court held that a law permitting the prosecution of sex-related child abuse offenses within one year of the victim's report to police may not be applied to

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[Footnote continued from previous page]

"No . . . ex post facto Law shall be passed." Section 10 of Article I states that "No State shall . . . pass . . . any ex post facto Law[.]"

offenses whose prosecution was time-barred at the time of the law's enactment. That use of such a law would "produce the kind of retroactivity that the Constitution forbids[.]" *Id.*

This Court recognized in *Bouie* that the Due Process Clause of the Fourteenth Amendment prohibits *courts* from achieving through judicial decision-making many of the same retroactive changes in criminal law that would be forbidden under the Ex Post Facto Clause if attempted by the legislative branch. 378 U.S. at 353-54 ("If a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.") As this Court has recognized in the context of judicial decisions that "attach[] criminal penalties to what previously had been innocent conduct[,]" the guiding principles for determining whether the Due Process Clause forbids judicial expansion of a criminal statute are "notice, foreseeability, and, in particular, the right to fair warning[.]" *Rogers*, 532 U.S. at 459; *see also Marks v. United States*, 430 U.S. 188, 191-92 (1977).

A new limitations period, when applied retroactively to permit a prosecution that the passage of time had previously barred, violates the requirements of notice, foreseeability and fair warning protected by the Due Process Clause. In particular, a State that applies its laws in such a manner "has deprived the defendant of the 'fair warning,' *Weaver v. Graham*, 450 U.S. 24, 28 (1981), that might have led him to preserve exculpatory evidence." *Stogner*, 539 U.S. at 611. It "'unfair[ly] and dishonest[ly]'" permits prosecution "after the State has assured 'a man that he has become safe from its pursuit[.]'" *Id.* (quoting Judge Learned Hand in *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928)). In fact, such a statute "falls literally within the categorical descriptions of *ex post facto* laws set forth" in *Calder* because it "enable[s] punishment where it was not otherwise available 'in the ordinary course of law,'" 539 U.S. at 611, 614, and it "permit[s] conviction on a quantum of evidence where that quantum, at

the time the new law is enacted, would have been legally insufficient." 539 U.S. at 616.[6]

Of course, not every judicial ruling that reevaluates and refines the scope of criminal law is unconstitutional. Rather, the test for determining if the retroactive application of such a judicial decision violates the Due Process Clause is whether it construes the law in a manner that is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]'" *Bouie*, 378 U.S. at 354. This formulation provides courts with the needed flexibility to ensure that the law may evolve, *see Rogers*, 532 U.S. at 462, while at the same time ensuring fundamental fairness, including the requirement that the prosecution and punishment of particular conduct be foreseeable. *See Rogers*, 532 U.S. at 461–62; *Marks*, 430 U.S. at 191–92; *Bouie*, 378 U.S. at 354. A judicial ruling that is unexpected and indefensible by reference to the status quo ante deprives a defendant of those protections. *Bouie*, 378 U.S. at 354.

As applied to statutes of limitations, the Due Process Clause prohibits the same sort of "unexpected and indefensible" judicial rulings described in *Bouie* if such rulings would authorize prosecution that the passage of time had previously barred. As noted above, this Court made clear in *Stogner* that such a result threatens the same "'manifestly *unjust and oppressive*'" effects that result from the retroactive application of other new criminal laws, and it "'unfair[ly]'" and "'dishonest[ly]'" allows prosecution after the State has "as-

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[6] The outcome in *Stogner* did not depend on the petitioner's ability to prove he had actually relied on the pre-existing limitations period or that he otherwise had been prejudiced by the prosecution's delay. The Court instead noted generally that "[m]emories fade, and witnesses can die or disappear" when there is a lengthy delay. 539 U.S. at 631. Although proof of prejudice to petitioner is therefore unnecessary, the retroactive extension of the limitations period in fact worked manifest prejudice against him. The prejudice included faded witness memories, the death and other unavailability of key witnesses, and petitioner's loss of the ability to be adjudicated as a juvenile rather than an adult.

sured 'a man that he has become safe from its pursuit[.]'" *Stogner*, 539 U.S. at 611. A judicial decision that is unexpected and indefensible by reference to the law which had been expressed after the previous limitations period had expired, and that authorizes criminal prosecution that previously had been barred, therefore falls squarely within the prohibitions of the Due Process Clause.

2. The Connecticut Supreme Court's decision overruling its earlier interpretation of the 1976 limitations statute—and then applying the new expansive interpretation for the first time in petitioner's case—is contrary to this Court's rulings in *Bouie*, *Marks* and *Rogers*. The Connecticut court, in holding that the 1976 repeal of certain limitations periods could apply in petitioner's case, overruled two of its own cases that were directly on point. Those cases—both decided after the expiration of the five-year limitations period for non-capital murder and several years before petitioner's arrest—squarely held that the 1976 statute does *not* apply to offenses committed before 1976. To reach the contrary result in petitioner's case, the state court simply changed its interpretation of the 1976 statute, accepting arguments that on each previous occasion it had considered and unanimously rejected. Such a construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *see Bouie*, 378 U.S. at 354, and giving that new construction retroactive effect violates due process.

a. The legal issue controlling petitioner's motion to dismiss—that is, whether Connecticut's 1976 amendment to its limitations statute may be applied to his case—was squarely decided, not once but twice, before the State charged him with Martha Moxley's murder. Those two unanimous decisions left no doubt that the limitations period for a non-capital murder that occurred in 1975 was five years.

The *Paradise* case squarely held that persons charged with a non-capital murder that predated the 1976 amendment to Section 54-193 must be charged within five years of the

offense. That outcome was based on two legal rulings, each of which squarely applies to petitioner's case and—had the court adhered to them—would bar his prosecution.

First, the court held in *Paradise* that the criminal limitations statute in effect at the time of the offense that the State charged here "provided for a five-year period of limitations on all felony offenses." 456 A.2d at 306-07 (citing Conn. Gen. Stat. § 54-193).[7] That limitations statute was also in effect at the time of Moxley's murder, and the underlying offense—non-capital murder charged under Conn. Gen. Stat. § 53a-54a—was also the same.

Second, *Paradise* held that the 1976 amendment to the limitations statute—the amendment that for the first time abolished the limitations period for Class A felonies such as non-capital murder—is not "to be applied retroactively" to offenses that pre-dated the amendment. 456 A.2d at 306 & 309. The court, drawing a clear distinction between "the legislature's power to enact retrospective legislation" and the question whether *this* statute was retroactive "by its terms," 456 A.2d at 306, flatly and unanimously rejected the State's argument that the "procedural" nature of the statute of limitations and "considerations of good sense and justice mandate its retrospective application," *id.* at 307. Applying a presumption against retrospective application of criminal stat-

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[7] The court stated that it was not deciding "whether this statute, which does not specifically cover *capital* offenses, bars prosecution of a person for a crime for which the punishment is or may be death." 456 A.2d at 306 n.1 (emphasis added). In fact, the State later successfully proceeded against the two *Paradise* defendants on capital murder charges. *State v. Ellis*, 497 A.2d 974 (Conn. 1985). Under Connecticut law, capital murder is murder involving one of six special circumstances, such as killing a law enforcement officer, acting for pecuniary gain or killing while under a sentence of life imprisonment. Conn. Gen. Stat. § 54a-54b (Rev. to 1975). The question reserved in *Paradise* and answered in *Ellis* has no effect on the limitations period applicable to petitioner. "There is no dispute that the murder of the victim in the present case did not give rise to a charge of capital murder." Pet. App. 33a n.32.

utes, and finding "nothing in General Statutes § 54-193 which indicates a clear legislative intent that the statute have a retrospective effect," the court held that the charges were time-barred. *Id.* at 309.

The ruling in *Paradise* left no doubt that the prosecution of a non-capital murder committed in Connecticut in 1975 must be commenced in or before 1980. And assuming any doubt remained, the Connecticut Supreme Court removed it with its decision nine years later in *State v. Crowell*, 636 A.2d at 804. In *Crowell*, the State again sought retrospective application of a criminal limitations statute—this time an act that extended the five-year limitations period to seven years for child sex offenses. As was the case in *Paradise*, the pre-existing limitations period had expired before the defendant was charged. "These facts," the *Crowell* court observed, "make clear that in *Paradise*, we considered the identical issue raised in this appeal, that is, whether a new statute of limitations may be applied to an offense committed prior to its effective date, where the new statute takes effect before the original statute of limitations expires." 636 A.2d at 806. The State acknowledged that *Paradise* was controlling but argued it should be overruled because it was based on a "faulty premise." *Id.* In particular, the State contended that "the *Paradise* court's 'reliance on rules of statutory construction pertaining to retroactivity is misplaced and should be reconsidered.'" *Id.*

The court in *Crowell* considered, and once again rejected, the State's position. It noted that in *Paradise* it had already explicitly rejected the same arguments the state advanced in favor of retroactive application of the limitations period. 636 A.2d at 806. The *Crowell* court went on to explain that it nonetheless conducted "a thorough consideration of the parties' arguments in *State v. Paradise*, supra, and the reasoning behind that decision" and "conclude[d] that it should not be overruled." *Id.* at 807.

The *Crowell* decision, coming nearly 20 years after the offense with which petitioner was later charged, therefore

reaffirmed the Connecticut Supreme Court's ruling in *Paradise* that the 1976 law abolishing the limitations period for non-capital murder did not apply to offenses that occurred before April 6, 1976. The *Paradise* case, in turn, was indistinguishable from petitioner's. It involved a prosecution for non-capital murder based on conduct that pre-dated the 1976 amendment's expansion of the limitations period beyond five years. And the unanimous ruling unequivocally established that such a prosecution could not be commenced more than five years after the offense occurred—1980 in this case.

b. The Connecticut Supreme Court's decision to revive petitioner's time-barred prosecution conflicts with this Court's rulings in *Bouie*, *Marks* and *Rogers*. In each of those cases the Court held that the Due Process Clause forbids giving retroactive effect to a new and more expansive construction of a criminal statute if that construction is unexpected and indefensible by reference to the law that had been previously expressed. As the Court's explanation of that test in each of those three cases makes clear, the Connecticut Supreme Court decision cannot be squared with those rulings.

In *Bouie*, this Court held that the South Carolina Supreme Court's expansive construction of a trespass statute could not be applied to conduct pre-dating that broad interpretation. The statute forbade "'entry upon the lands of another * * * after notice from the owner or tenant prohibiting such entry[.]'" 378 U.S. at 349-50. The state supreme court applied that statutory prohibition to two defendants who merely remained on the premises after being asked to leave. This Court reasoned that "[t]here was nothing in the statute [prior to the South Carolina Supreme Court's post-conduct interpretation] to indicate that it also prohibited the different act of remaining on the premises after being asked to leave." *Id.* at 355. Not only was this interpretation "at variance with the statutory language," it did not find "the slightest support in prior South Carolina decisions." *Id.* at 356 ("In sum, in the 95 years between the enactment of the statute in 1866 and the 1961 decision . . . the South Carolina cases construing the statute . . . gave not the slightest indication that that require-

ment could be satisfied by proof of the different act of remaining on the land after being told to leave.") *Id.* at 356-57. Thus, the petitioners in *Bouie*, "had no fair warning of the criminal prohibition under which they now stand convicted," and therefore the application of the court's new interpretation to the petitioners violated due process. *Id.* at 361.

The Connecticut Supreme Court's decision to overrule precedent and apply a new interpretation of the 1976 limitations statute to petitioner is contrary to the reasoning and the holding in *Bouie*. In fact, the court's determination in petitioner's case that the limitations period for class A felonies occurring in 1975 had been abolished in 1976 was even more "unexpected and indefensible" than the South Carolina Supreme Court's interpretation of its trespass statute. In *Bouie*, this Court found the new interpretation of the statute to be "unexpected and indefensible" where prior cases interpreting the statute had *never addressed* whether prosecution could be predicated on the refusal to obey a request to leave. Here, however, the Connecticut Supreme Court had already affirmatively addressed the very question at issue—whether the 1976 statute was meant to apply to pre-enactment offenses—and explicitly held that the statute did *not* authorize prosecution of the category of offenses with which petitioner was later charged. *Paradise*, 456 A.2d 305. And the court reaffirmed that 1983 holding in 1994, after explicitly rejecting the state's argument that the case had been wrongly decided. *Crowell*, 636 A.2d 804. Thus, for at least 11 of the 19 years between the expiration of the five-year limitations period and petitioner's arrest, he had the strongest possible assurance that the 1976 limitations statute could not apply to him.[8]

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[8] It is sufficient, for purposes of making out a due process violation, that the state's "assur[ance]" that petitioner was "'safe from its pursuit,'" *Stogner*, 539 U.S. at 611, took the form of unanimous rulings spanning a period of 11 years. Nonetheless, between 1994 (when *Crowell* was decided) and 2000 (when petitioner was charged), the Connecticut Supreme Court did not so much as hint the contrary—*i.e.*, that *Paradise* and *Crowell* were wrongly decided. Indeed, it gave no such indication until nearly four years

Those rulings on the scope of the 1976 statute were at least as "definite and precise" as the trespass statute in *Bouie*. In overruling those two cases, the Connecticut Supreme Court gave the 1976 statute an interpretation that was "unexpected and indefensible by reference to the law" which that very court had "expressed" after the then-applicable limitations period had expired. Under *Bouie*, the court violated petitioner's due process rights.

The Connecticut Supreme Court's ruling also conflicts with this Court's decision in *Marks*, a case rejecting on due process grounds the retroactive application of a broader definition of obscenity where the broadening resulted from the Court's decision to overrule one of its prior cases. The Court had previously articulated in a plurality opinion a three-part test for obscenity. *See Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Seven years later, in *Miller v. California*, 413 U.S. 15 (1973), the Court modified, among other things, the third part of the *Memoirs* test. That third part, which had protected expressive material unless "'utterly without redeeming social value[,]'" was altered to focus the inquiry on "'whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'" *See Marks*, 430 U.S. at 190-91. The petitioners in *Marks*, whose conduct predated the *Miller* decision, argued they were entitled to jury instructions under the more favorable *Memoirs* formulation of part three. This Court agreed, because *Miller* "marked a significant departure from Memoirs[,]" 430 U.S. at 194, and petitioners therefore "had no fair warning that their products might be subjected to the new standards." 430 U.S. at 195.

The Connecticut Supreme Court's alteration of the law to uphold petitioner's conviction contains the same features that required reversal in *Marks*. The Connecticut Supreme Court's opinion "did not simply clarify" the *Paradise* and *Crowell* decisions; it "marked a significant departure from"

[Footnote continued from previous page]

after petitioner was convicted, when it unexpectedly overruled those decisions in affirming petitioner's own conviction.

those prior rulings. *See Marks*, 430 U.S. at 194. Indeed, a more significant departure could not be imagined. And the *Marks* Court reversed even though "the Memoirs standards never commanded the assent of more than three Justices at any one time," 430 U.S. at 192, and even though persons tried after the *Miller* decision were entitled to the application of "'any constitutional principle enunciated in *Miller* which would serve to benefit'" them. 430 U.S. at 197 (quoting *Hamling v. United States*, 418 U.S. 87, 102 (1974)). The case for reversing petitioner's conviction is even stronger where, unlike in *Marks*, there was no sign that the prior decisions were vulnerable to change and where nothing in the new interpretation of the 1976 statute was even arguably favorable to petitioner. Here, no less than in *Marks*, the highest court's reversal of—and marked departure from—its own recent case law deprived petitioner of fair notice that the prosecutor could bring a case that previously was disallowed.

The Connecticut Supreme Court's retroactive application of its interpretation of the 1976 statute to petitioner is also inconsistent with this Court's opinion in *Rogers*. In *Rogers*, this Court held that the judicial abrogation of Tennessee's common law year-and-a-day rule for murder cases was not unexpected or indefensible by reference to the law that previously had been expressed, and thus could be applied retroactively without offending the Due Process Clause. 532 U.S. 451. But the Court noted that the year-and-a-day rule, permitting murder charges only if the victim died within a year and a day of the defendant's injurious conduct, was rooted in the incapability of 13th century medical science to establish causation beyond a reasonable doubt when a great deal of time had elapsed between the victim's injury and his death. *Id.* at 463. Practically every court to have considered the rule before the petitioner committed his offense had noted that advances in medical science rendered the rule obsolete. *Id.* The first and only mention of the rule by the Tennessee Supreme Court was in 1907, reversing the conviction of the defendant and noting the rule only in passing. *Id.* at 464–65. Moreover, "at the time of petitioner's crime," the year-and-a-

day rule had "only the most tenuous foothold as part of the criminal law of the State of Tennessee . . . [T]he rule had never once served as a ground of decision in any prosecution for murder in the State." *Id.* at 464. Thus, this Court held that "[f]ar from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense." *Id.* at 467.

The Connecticut Supreme Court's decision, on the other hand, was anything but "a routine exercise of common law decisionmaking" that "brought the law into conformity with reason and common sense." Not only was the court interpreting a statute, rather than promoting the evolution of judge-made common law, the court's *Paradise* and *Crowell* decisions were recent rulings based on well-established principles of state law. *See, e.g., Paradise*, 456 A.2d at 308 (noting that for criminal cases, "the law in Connecticut has long been to the contrary" of the rule in the civil field that procedural statutes are presumed to operate retrospectively). Those decisions were not questioned by the court until 2006, when the court for the first time credited the State's argument, rejected twice before in *Paradise* and *Crowell*, that the 1976 statute should apply retroactively. Thus, the court's decision that "*Paradise* was wrongly decided," Pet. App. 32a, is the "marked and unpredictable departure" from a court's prior precedent to which *Rogers* refers. *See* 532 U.S. at 467. The retroactive application of such a departure to petitioner therefore offends the constitutional guarantees of due process articulated by this Court in *Rogers* too.

c. The breadth of the Connecticut Supreme Court's approach to retroactivity is of enormous significance. If that approach is permitted, no citizen may rely on a state supreme court's interpretation of its own criminal statutes, no matter how precisely on-point or longstanding or well-settled the prior interpretation. Such an interpretation could be reversed and applied retroactively to a defendant's detriment on the pretext that every citizen is on fair notice that *stare decisis* is

not an absolute principle. The right to fair warning in this context would be rendered a nullity by the fact that every judicial decision has the potential of one day being overruled. Such a proposition is so far-reaching that this Court's review is warranted.

B. The Connecticut Supreme Court's Application of Its New Statutory Interpretation to Petitioner Conflicts With The Decisions Of Federal Courts of Appeals And Another State Supreme Court.

The Connecticut Supreme Court decision also conflicts with rulings from the federal courts of appeals and the highest court of another state, all of which have held that the reversal of recent and binding precedent interpreting a state statute or other provision of law violates the Due Process Clause. These courts have expressly ruled that such new interpretations are "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]'" *Bouie*, 378 U.S. at 354. This conflict independently warrants the Court's review.

First, the Connecticut Supreme Court decision conflicts with the Eighth Circuit's holding in *Moore v. Wyrick*, 766 F.2d 1253, 1258-59 (8th Cir. 1985). There, the court held that a new Missouri Supreme Court construction of that State's felony murder statute may not be applied retroactively because: (1) until that new decision an earlier controlling opinion reached a different result on indistinguishable facts; (2) no intervening case challenged or weakened the earlier opinion's authority; and (3) the new decision significantly expanded the scope of the statute.

The issue in *Moore* was whether the defendant, who participated in an armed robbery, could be charged under the felony murder statute where a bystander was killed, not by a shot that defendant or an accomplice fired, but by one fired by one of the intended victims of the robbery. 766 F.2d at 1254. The Eighth Circuit conceded that the plain language of Missouri's felony murder statute—without more—might have provided fair notice to the defendant that he could be

charged under such circumstances. *Id.* at 1257. But the Missouri Supreme Court had previously concluded, in *State v. Majors*, 237 S.W. 486 (Mo. 1922), that the statute was limited to cases where the killing was committed by the defendant or an accomplice. "As such," the Eighth Circuit held, "whether or not the plain language of the statute would, absent prior judicial construction, give Moore fair warning that his conduct might constitute felony murder is irrelevant. Instead, we must determine whether the expanded scope of the Missouri felony murder statute was foreseeable in light of its previously narrow construction." 766 F.2d at 1257-58. The Eighth Circuit concluded that the expanded construction of the statute was not foreseeable, because "the issue presented in *Majors* and, more importantly, the court's decision in *Majors* were never reexamined or questioned by the Missouri courts." 766 F.2d at 1258 (concluding that "the change in law judicially effected . . . was constitutionally unforeseeable and thus cannot be applied retroactively").

The Connecticut Supreme Court's decision was an equally unforeseeable expansion of a criminal statute, because: (1) *Paradise*, a case dealing with indistinguishable facts, was controlling; (2) no intervening case challenged or weakened its authority—indeed, its authority was confirmed by *Crowell*; and (3) the new decision significantly expanded the scope of the limitations period to authorize a prosecution that had previously been barred. The Connecticut Supreme Court's decision is in square conflict with the Eighth Circuit's decision in *Moore*.

Second, the decision below conflicts with the Ninth Circuit holding in *United States v. Potts*, 528 F.2d 883, 886 (9th Cir. 1975) (en banc), that the reversal of one of its own decisions, which had the effect of expanding the scope of a federal criminal statute, could not be applied retroactively. The *Potts* court overruled an earlier decision on the ground that it had been based on a misreading of state law, and thus held that an individual whose felony record had been expunged under Washington law was still a felon for the purposes of the felon-in-possession-of-firearms laws. *Id.* at 884-85 &

n.2. The court further held, however, that its new interpretation could not be applied retroactively to Potts because at the time he possessed a firearm he lacked notice of the broader interpretation of the statute. *Id.* at 886 ("While Hoctor stood as the law of this circuit, a person such as Potts, whose sole prior felony conviction had been expunged pursuant to the Washington statute, could not reasonably have suspected that his possession of a firearm, in or affecting commerce, would constitute a § 1202(a)(1) violation.") The Ninth Circuit's conclusion that "due process fairness bars the retroactive judgment of his conduct using the expanded definition," *id.* (internal quotation marks and citation omitted), is also in direct conflict with the Connecticut Supreme Court's retroactive application of a new and expanded interpretation of a criminal statute.

Finally, the California Supreme Court held in *People v. Martinez*, 20 Cal. 4th 225, 240-41 (1999), that its new test for the asportation element in simple kidnapping cases could not be applied retroactively because the previous line "was laid down" by two previous decisions of the state supreme court and the defendant "had no fair warning that it would be redrawn." 20 Cal. 4th at 241. Noting that the "mere possibility that this court might reconsider its own precedent is not the equivalent of actually overruling it," *id.* at 240 (internal quotation marks and citation omitted), the court refused to apply the new interpretation retroactively. The Connecticut Supreme Court's decisions in *Paradise* and *Crowell* did not even hint at a "possibility" that the court might reconsider its own precedent, twice rejecting the same arguments presented by the State in the case at hand. As such, the Connecticut Supreme Court's retroactive application of a new interpretation also conflicts with the California Supreme Court's decision in *Martinez*.

CONCLUSION

For more than 20 years following the expiration of the limitations period in effect at the time of the offense, the Connecticut Supreme Court gave petitioner the strongest assurance that a broader limitations statute did not apply. In abruptly overruling the cases that provided that assurance, and then applying the new interpretation retroactively to petitioner, the Connecticut Supreme Court contravened the precedent of this Court and created a conflict with the rulings of federal courts of appeals and another state supreme court. This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted.

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No.

IN THE

Supreme Court of the United States

MICHAEL SKAKEL,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ Of Certiorari to the Supreme Court of Connecticut

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Supreme Court of Connecticut.
STATE of Connecticut

v.

Michael SKAKEL.
No. 16844.

Argued Jan. 14, 2005.
Decided Jan. 24, 2006

SULLIVAN, C.J., and KATZ, PALMER, VERTEFEUILLE and ZARELLA, Js.

Opinion

PALMER, J.

On October 31, 1975, fifteen year old Martha Moxley was found bludgeoned to death in a wooded area on the grounds near her family home in Greenwich. No one was charged in connection with her murder until twenty-five years later, when the defendant, Michael Skakel, a fifteen year old neighbor of the victim at the time of her death, was arrested and charged with the crime. The case initially was brought in the Superior Court for Juvenile Matters and, thereafter, transferred to the regular criminal docket of the Superior Court. Thereafter, the case was tried to a jury, which found him guilty of murder in violation of General

Statutes (Rev. to 1975) § 53a-54a (a).[1] The trial court rendered judgment in accordance with the jury verdict,[2] from which the defendant appealed.[3] On appeal, the defendant claims that: (1) his case improperly was transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court; (2) his prosecution was time barred by the five year statute of limitations for felonies that was in effect when the victim was murdered in 1975; (3) the state failed to disclose certain exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), thereby depriving him of his right to a fair trial; (4) the state's attorney engaged in pervasive misconduct during closing argument in violation of the defendant's right to a fair trial; (5) the trial court improperly permitted the state to introduce into evidence the prior sworn testimony of a certain witness in violation of the defendant's constitutionally protected right of confrontation; and (6) the trial court improperly permitted the state to present evidence of several incriminating statements that the defendant made while a resident at a school for troubled adolescents in Maine. The defendant also challenges the propriety of several other evidentiary rulings of the trial court. We reject each of the defendant's claims and, accordingly, affirm the judgment of the trial court.

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[1] General Statutes (Rev. to 1975) § 53a-54a provides in relevant part: "(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person...."

[2] The trial court sentenced the defendant to a term of twenty years to life imprisonment.

[3] The defendant appealed from the judgment of the trial court to the Appellate Court. Because the defendant should have taken his appeal directly to this court; *see* General Statutes § 51-199(b)(3); his case was transferred to this court pursuant to Practice Book § 65-4.

The jury reasonably could have found the following facts. Sometime between 6:30 and 7:30 p.m. on the evening of Thursday, October 30, 1975, the victim left her home on Walsh Lane, located in the Belle Haven section of Greenwich, with a friend, Helen Ix, to play and socialize in and around the neighborhood. It was the night before Halloween, commonly referred to as "mischief night," an evening when the neighborhood children were known to engage in playful mischief. The victim and Ix soon were accompanied by other friends who lived nearby. Several times that night, the group stopped by the Skakel home, which was located on Otter Rock Drive.[4] The first time they did so, the defendant was dining at the Belle Haven Club with his siblings, Rushton Skakel, Jr., Julie Skakel, Thomas Skakel, John Skakel, David Skakel and Stephen Skakel, their cousin James Dowdle,[5] their tutor Kenneth Littleton, and Julie Skakel's friend Andrea Shakespeare. The Skakel group arrived home from dinner before 9 p.m., at which time the victim and her friends again visited the defendant's house.

Shortly thereafter, the defendant, joined by the victim, Ix and Jeffrey Byrne, a friend of the victim, entered one of the Skakel family vehicles, a Lincoln Continental, which was parked on the Skakels' side driveway, to talk and listen to music. Thomas Skakel, the defendant's then seventeen year old brother, soon joined the group. Sometime before 9:30 p.m., the group was interrupted by Rushton Skakel, Jr., and John Skakel, who needed to use the Lincoln Continental to drive Dowdle home, where they planned to watch a television program scheduled to air at 10 p.m. Consequently, Thomas Skakel, Ix, Byrne and the victim exited the car. As

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[4] The victim's home was located on Walsh Lane, diagonally across the street from the defendant's home, which faced Otter Rock Drive.

[5] Dowdle also was known as James Terrien.

Ix began to leave the Skakel property with Byrne, she observed Thomas Skakel and the victim engaging in flirtatious horse play at the other end of the driveway. Feeling "a bit embarrassed by the flirting," Ix left to go home.[6]

The victim's mother, Dorothy Moxley, expected that the victim would be home that evening by 10:30 or 11 p.m. At about 1:30 or 2 a.m., upon discovering that her daughter had not returned home, she sent the victim's brother, John Moxley, out to look for her. Dorothy Moxley thereafter telephoned anyone who she thought might know the victim's whereabouts, including the defendant's family, whom Dorothy Moxley called several times. Dorothy Moxley's efforts to locate the victim were unsuccessful, and she eventually contacted the Greenwich police department, which dispatched an officer to the Moxley home. The officer made a missing persons report and briefly searched the surrounding area. The next morning, at about 8:30 a.m., Dorothy Moxley, believing that the victim may have fallen asleep in the Skakel family motor home that usually was parked in the Skakels' driveway, went to the defendant's house. The defendant answered the door, appearing "hungover" and dressed in jeans and a T-shirt. The defendant informed Dorothy Moxley that

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6 The trial testimony was less than definitive as to whether the defendant had accompanied his brothers when they drove Dowdle home or whether he had stayed behind with the victim and the others. For example, Shakespeare testified that the defendant had stayed behind and did not accompany his brothers to Dowdle's home that night. Shakespeare, however, was unable to articulate the basis of her recollection and conceded that she had no specific memory either of the Lincoln Continental leaving without the defendant or seeing the defendant in the house after the car had departed for Dowdle's home. Rushton Skakel, Jr., John Skakel and Dowdle all testified that the defendant had accompanied them to Dowdle's home that evening.

the victim was not at his home, and an inspection of the motor home by a Skakel employee confirmed that she was not there either.

Later that day, at about noon, a neighborhood friend discovered the victim's dead body under a large pine tree in a wooded area on the Moxley property. The victim was lying facedown, with her pants and panties pulled down around her ankles. Forensic tests revealed that the victim had died from multiple blunt force traumatic head injuries. A large quantity of blood was discovered in two areas in a grassy region approximately seventy feet from the victim's body, with a distinct drag path leading from the pools of blood to the location where the victim's body was found. The victim likely was assaulted at or near the farther end of her circular driveway and then dragged approximately eighty feet to the pine tree under which her body subsequently was discovered. Remnants of the murder weapon, a Tony Penna six iron golf club, also were found at the crime scene. The head of the golf club and an eight inch section of its shaft were found on the circular driveway, approximately 116 feet from the area where the large accumulation of the victim's blood was found. Another piece of the shaft was discovered on the grassy area near the two large pools of blood. The remaining part of the shaft attached to the club handle never was found.

Harold Wayne Carver II, a forensic pathologist and the state's chief medical examiner, testified regarding the findings of the original autopsy performed by then chief medical examiner Elliot M. Gross, also a forensic pathologist. Carver stated that the victim's injuries appeared consistent with having been inflicted by a golf club. In addition to the fatal head injuries, the victim had been stabbed in the neck with a piece of the golf club shaft. According to Carver, Gross had used an ultraviolet light to detect the presence of semen on the victim's pubic region and also had taken vaginal and anal swabs. No semen was found in those areas, however. Noth-

ing in the autopsy report indicated that the ultraviolet light had been applied to the victim's buttocks or to other parts of the victim's body. With respect to the time of death, Carver testified that the victim had been dead for some time before her body was found. He further opined that the time of death more likely was closer to 9:30 p.m. on October 30, 1975, when she was last seen alive, rather than noon the following day, when her body was discovered. Because the autopsy was conducted twenty-four hours after the discovery of the victim's body, a more precise time of death could not be ascertained.[7]

Henry Lee, a forensic scientist and the former state chief criminalist, reviewed the documents, photographs and physical evidence compiled by the investigators and performed a partial reconstruction of the crime scene. On the basis of his investigation, Lee testified as to the likely nature and sequence of events leading up to the victim's death. In particular, he indicated that the golf club that was used to assault and kill the victim probably had broken into pieces from the force with which the victim had been struck. This force, according to Lee, likely propelled the head of the golf club, and a piece of its shaft, over seventy feet, from the location of the fatal assault to the location inside the circular driveway where those pieces subsequently were discovered. Accord-

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[7] The evidence revealed that residents in the neighborhood heard a disturbance between 9:30 and 10 p.m. on October 30, 1975, near the Moxley property. Dorothy Moxley testified that, around that time, she heard a commotion coming from the general direction of the area where the victim's body subsequently was discovered. She recalled hearing dogs barking and what sounded like excited young voices. Ix testified that her dog began to bark incessantly shortly after 9:30 p.m. David Skakel also recalled hearing dogs barking at approximately 10 p.m. that night.

ing to Lee, the remaining piece of the golf club shaft then was used as a sharp weapon to stab the victim. Lee further testified that, in light of the amount of blood found on the inside of the victim's jeans and panties, those garments likely were pulled down before the assault occurred. Lee also stated that the absence of vertical blood drippings on the victim's shoes and jeans indicated that the victim was lying on the ground when the perpetrator inflicted the injuries to her head and neck.

James Lunney, a detective with the Greenwich police department in 1975, testified that, on the day that the victim's body was discovered, he briefly visited the defendant's home and noticed a barrel containing several items, including golf clubs, in a hallway near the rear of the home. Lunney testified that one of the golf clubs, a Tony Penna four iron, later was seized from the property with the written consent of the defendant's father. Thomas G. Keegan, a captain in the detective division of the Greenwich police department in 1975, testified that an examination of the seized golf club and the golf club parts found at the crime scene revealed that the murder weapon came from the defendant's home.[8]

In the days and months following the victim's murder, the Greenwich police conducted numerous interviews in furtherance of its criminal investigation into the victim's death.

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[8] The seized golf club had two labels affixed to the shaft just below the handle of the grip. One label, from the Greenwich Country Club, indicated that the club had belonged to "Mrs. R.W. Skakel" of "Greenwich, Conn.," the defendant's deceased mother. Keegan testified that, along with the visible similarities between the murder weapon and the club seized from the Skakel home, namely, the brand and the make, a criminalist's examination of the murder weapon and the seized club revealed that the markings on the heads of the clubs were consistent with the two clubs previously having come in contact with one another.

The defendant and his siblings were among those interviewed in the early stages of that investigation. On November 15, 1975, the defendant, who was accompanied by his father, gave a tape-recorded interview to the Greenwich police at the police station. Responding to inquiries concerning his whereabouts on the night of the murder, the defendant explained that he had accompanied his brothers and Dowdle to Dowdle's home, which was about twenty minutes away, and watched the television show "Monty Python's Flying Circus." According to the defendant, he returned to his home around 10:30 or 11 p.m.,[9] and went to bed about fifteen minutes later. When asked specifically about whether he left the house after he went to his bedroom that night, the defendant responded, "no." The defendant acknowledged, however, that, on other occasions, he had left his home after ostensibly retiring to his room for the night.

In 1977, two years following the victim's murder, the defendant revealed certain feelings of guilt and remorse to Larry Zicarelli, who then was employed by the defendant's family as a driver and general handyman. While being driven by Zicarelli to an appointment in New York City, the defendant, distraught from an earlier altercation with his father, told Zicarelli that he "had done something very bad" and that he "either had to kill himself or get out of the country." On another occasion, Zicarelli and the defendant were stopped in traffic on the Triborough Bridge in New York on their way home when the defendant "opened the [car] door, started to jump out of the car and ran to the side ... of the

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[9] Dowdle and Rushton Skakel, Jr., corroborated the defendant's statement that he had spent part of that evening at Dowdle's home watching television. Shakespeare, however, recalled seeing the defendant at his home after Dowdle and Rushton Skakel, Jr., departed for Dowdle's home in the Lincoln Continental.

bridge." Zicarelli ran after the defendant and forced him back into the car. As Zicarelli was proceeding to the driver's side door, the defendant again exited the car and ran toward the other side of the bridge. Zicarelli once again hurried toward the defendant and forced him back into the car. Just before Zicarelli and the defendant arrived at the Skakel home, Zicarelli asked the defendant, "[W]hy would [you] want to do what [you were] trying to do?" The defendant responded that, "if [you] knew what [I] had done, [you] would never talk to [me] again."[10] Immediately following this incident, Zicarelli terminated his employment with the Skakels.[11]

From 1978 to 1980, the defendant was a resident at the Elan School, a residential facility for troubled adolescents located in Poland Springs, Maine. Several former Elan residents testified about the deplorable conditions at the institution, which employed a behavioral modification approach predicated on controversial techniques of intimidation, confrontation and humiliation of its residents. As a result, Elan

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[10] On cross-examination, defense counsel asked Zicarelli whether he was aware that, on the night before this incident, the defendant "had slept in his dead mother's dress and felt bad about it ...." Zicarelli responded that he had been unaware of any such incident. Julie Skakel testified that the defendant had contemplated jumping off the Triborough Bridge because he felt guilty about having slept in his deceased mother's dress.

[11] The state also introduced the testimony of Matthew Tucharoni, who stated that, in the spring of 1976, the defendant, accompanied by Rushton Skakel, Jr., and Julie Skakel, came to the barbershop in Greenwich where Tucharoni then was employed and inquired about a haircut. Tucharoni testified that while he was preparing to cut the defendant's hair, he overheard the defendant say, "I am going to kill him." According to Tucharoni, Julie Skakel responded, "you can't do that," and the defendant replied, "Why not? I did it before...."

residents regularly endured mental and physical abuse at the hands of their peers and Elan staff members. While a resident at Elan, the defendant frequently was confronted and interrogated about his involvement in the victim's murder. For example, Charles Seigen, who was enrolled at Elan with the defendant from 1978 to 1979, testified that he recalled attending two or three group therapy sessions, supervised by a staff member and typically attended by eight residents, during which the defendant was confronted about the victim's murder. According to Seigen, the defendant sometimes responded to such probing with annoyance. On other occasions, however, the defendant became very upset, cried and stated that he did not know if he had done it. The defendant also stated in these group sessions that, on the night of the victim's murder, he was "blind drunk" and "stumbling."[12]

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[12] Seigen also described the nature of the "general meetings" at Elan, which were convened to confront residents about specific issues. According to Seigen, "[a] general meeting was probably the scariest word that you would hear when you were at Elan." A typical general meeting, which was attended by 100 or more Elan residents and staff, focused on one or two residents who were singled out for violating Elan rules. Seigen recalled that the defendant was the subject of a general meeting as a result of his failed attempt to run away from the facility. Seigen stated that he first learned of the defendant's possible involvement in the victim's murder when it was announced at a general meeting by Joseph Ricci, Elan's executive director. Elizabeth Arnold, another former Elan resident, testified that, at that particular general meeting, which lasted approximately three hours, Ricci continuously had confronted the defendant about various issues and that four or five Elan residents "brutalized" the defendant in a boxing ring. Other former residents of Elan also testified about the details of the torment that the defendant had endured at this meeting, including accusations leveled against the defendant that he had killed the victim. The defendant's initial response to this interrogation

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Dorothy Rogers, another former resident of Elan, testified that, on one occasion, when she and the defendant were talking at an Elan social function, the defendant told her that he had been drinking on the night of the murder and that he could not recall whether he was involved in the victim's death. The defendant further explained to Rogers that his family had enrolled him at Elan because they feared that he may have murdered the victim and wanted him in a location far removed from the investigating officers. Gregory Coleman, a resident at Elan from 1978 to 1980, testified about an exchange that he had had with the defendant while Coleman stood "guard" over the defendant following the defendant's failed escape attempt from Elan. During this conversation, the defendant confided in Coleman about murdering a girl who had rejected his advances. According to Coleman, the defendant had admitted killing the girl with a golf club in a wooded area, that the force with which he had hit her had caused the golf club to break in half, and that he had returned to the body two days later and masturbated on it. John Higgins, another former resident of Elan, recounted certain emotional admissions that the defendant had made to him while the two were on guard duty one night on the porch of the men's dormitory at Elan. In particular, Higgins testified that the defendant had told him that, on the night of the murder, there was a "party of some kind or another" at the defen-

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was to deny his involvement in the murder. After several rounds in the boxing ring, however, the defendant stated, "I don't know" or "I don't remember" in response to questioning regarding his involvement in the murder. During the course of his enrollment at Elan, the defendant also was forced to wear a large cardboard sign around his neck, another form of punishment at Elan. The sign read, "Confront me on why I murdered Martha Moxley," or words to that effect.

dant's home. The defendant also told Higgins that he remembered rummaging through his garage looking for a golf club, running through the woods with the club and seeing pine trees. Higgins further stated that, as the conversation continued, the defendant's acknowledgment of his culpability in the victim's murder progressed from "he didn't know whether he did it" to "he may have done it" to "he must have done it," and finally to "I did it."

Elizabeth Arnold and Alice Dunn, both of whom had attended Elan during the defendant's stay at the facility, also testified about certain inculpatory statements that the defendant had made to them. Both testified that the defendant had expressed uncertainty as to whether he or his brother had murdered the victim. Arnold also recalled a group therapy session in which the defendant, upon being questioned about the victim's murder, stated that "[h]e was very drunk and had some sort of a blackout" that night, that his brother had "fool[ed] around" with his "girlfriend," and that his brother had stolen her from him. Dunn, who graduated from Elan in 1978 and subsequently became a staff member there, testified that while she was employed at Elan, the defendant stated that he was not in "his normal state" on the night of the murder.

Thereafter, in the summer of 1987, the defendant told Michael Meredith, a former Elan resident who was staying temporarily in the defendant's home, that, on the night of the victim's murder, he had climbed a tree on the Moxley property and masturbated in the tree while watching the victim through her window. According to Meredith, he first learned of the victim's murder in this conversation. The defendant also told Meredith that while he was in the tree, he saw his brother Thomas Skakel walk across the Moxley property toward the victim's home but that Thomas Skakel had not seen him in the tree. The defendant related a similar story to Andrew Pugh, a close childhood friend, when the two saw one

another in 1991. The defendant had expressed a desire to renew their friendship, which gradually had faded following the victim's murder. In an effort to ease Pugh's concerns about the defendant's involvement in the victim's death, the defendant assured Pugh that he did not kill the victim but mentioned that he had masturbated in a tree on the night that she was murdered. Pugh understood that the tree to which the defendant referred was the tree under which the victim's body was discovered.

The most descriptive account of the defendant's activities on the night of the murder came in 1997 from an taped-recorded conversation between the defendant and Richard Hoffman, a writer who was collaborating with the defendant on a book about the defendant's life. On that tape, the defendant explained to Hoffman that, earlier in the evening of the victim's murder, he had invited the victim, who was seated with the defendant in his father's car, to accompany him to his cousin's house to watch the Monty Python Flying Circus television show. The victim declined the invitation because of her curfew, and the two instead made plans to go "trick or treating" the next night. The defendant thereafter left for Dowdle's home with his brothers Rushton Skakel, Jr., and John Skakel, as well as Dowdle.

The defendant told Hoffman that, after returning to his own home from Dowdle's house, he had walked through the house in search of various people. Upon observing that the door to his sister's room was closed, he had "remember[ed] that [his sister's friend, Shakespeare] had gone home ...." He then indicated that he had gone into "the master bedroom [but] there was nobody there, the [television] was on but nobody was there." The defendant went upstairs to bed shortly thereafter, but he became "horny" and decided to spy on a "lady" who lived on Walsh Lane. The defendant then "snuck out" of his house and went to this person's home, hoping to see her through her window. Unsuccessful in that endeavor,

he thought, "[f]uck this ... Martha likes me, I'll go, I'll go get a kiss from Martha." (Internal quotation marks omitted.) The defendant then proceeded to the victim's home, climbed a tree near the victim's front door and masturbated in the tree for about thirty seconds. Shortly thereafter, "a moment of clarity came into [his] head," and the defendant climbed down from the tree and walked back home. On his way home, he threw rocks into the dark, repeatedly yelling, "Who's in there?" He and his friends previously had done this while shooting BB guns into the dark. The next morning, the defendant awoke to "[Dorothy] Moxley saying 'Michael ... have you seen Martha?'" The defendant thought to himself, "Oh my God, did they see me last night?" At that moment, the defendant told Hoffman, he "remember[ed] just having a feeling of panic."

The state also adduced evidence establishing that the defendant, who was infatuated with the victim, had grown resentful of her flirtatious friendship with his older brother Thomas Skakel, whom he considered his nemesis. According to Pugh, who in 1975 was friendly with the victim and the defendant, the defendant had "told [him] that he liked Martha quite a bit and had a crush on her." Pugh also testified that the defendant had told him that "he would have liked to have a relationship with her." Pugh testified that he had observed the defendant and the victim engage in "horseplay, roughhousing, fooling around ... [and] kissing one time in the [Skakel family motor home]." With respect to Thomas Skakel's relationship with the victim, Jacqueline Wettenhall O'Hara, a neighborhood friend of the victim, recounted observing flirtatious conduct between the victim and Thomas Skakel in the months leading up to the victim's death. Entries recorded in the victim's diary in the two months preceding her murder disclosed the victim's friendship with the defendant and Thomas Skakel, and also revealed the sometimes

flirtatious nature of her relationship with Thomas Skakel.[13] In addition, Ix testified that she had observed the victim and Thomas Skakel engaging in flirtatious horseplay the last time she saw the victim alive. Moreover, one of the sneakers that the victim was wearing when her body was recovered had the name "Tom" written on it.

The defendant raised an alibi defense at trial. In particular, he claimed that the victim had been murdered at ap-

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[13] For example, the victim made an entry in her diary on September 12, 1975, in which she stated that, while she was out driving in Thomas Skakel's car with several other teenagers, including the defendant, "I drove a little then ... I was practically sitting on [Thomas Skakel's] lap [be]cause I was only steering. He kept putting his hand on my knee.... [T]hen we went to Friendly's [restaurant and] Michael [the defendant] treated me [and] he got me a double but I only wanted a single so I threw the top scoop out the window. Then I was driving again [and Thomas Skakel] put his arm around me. He kept doing stuff like that." A diary entry from September 19, 1975, recounted the victim's activities with other neighborhood friends that day. In that entry, the victim stated that "Michael was so totally out of it that he was being a real asshole in his actions [and] words. He kept telling me that I was leading [Thomas Skakel] on when I don't like him (except as a friend) [and] I said, well how about you [and] Jackie. You keep telling me that you don't like her [and] you are all over her.... Michael jumps to conclusions. I can't be friends [with Thomas Skakel] just because I talk to him, it doesn't mean I like him." In a subsequent entry, dated October 4, 1975, the victim describes events that had occurred at a school dance and at a party after the dance at a neighbor's home. The entry included the following: "Afterwards I went to Mouakaud's for a party! I saw everybody. [Thomas Skakel] was being an ass. At the dance he kept putting his arms around me [and] making moves."

proximately 10 p.m. on October 30, 1975,[14] and that he was at Dowdle's home, some twenty minutes away from the murder scene, at that time. The defendant also raised a third party culpability defense, pointing to Littleton as a likely perpetrator of the victim's murder. In fact, Littleton, who had been hired as a parttime tutor by the Skakel family, had taken up residence at the Skakel home on October 30, 1975, the day that the victim was last seen alive, and had slept there with the Skakel children that night. Littleton testified that, after returning home from dinner at 9 p.m., he remained at the house all night, stepping outside briefly at approximately 9:30 p.m. only to investigate a disturbance.[15] In addition, testimony adduced by the defendant revealed that Littleton, who began to manifest serious psychiatric and behavioral problems in the years following the murder, may have made a statement, several years after the killing, in which he implicated himself in the crime. Littleton emphatically denied that he had had anything to do with the victim's death, however. –

At the conclusion of the trial, the jury found the defendant guilty of murder. The trial court denied the defendant's posttrial motions and, thereafter, sentenced the defendant to a period of incarceration of twenty years to life imprisonment. Additional facts will be set forth as necessary.

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[14] Defense counsel adduced testimony from Joseph Alexander Jachimczyk, a forensic pathologist from Houston, Texas, who concluded that the time of the victim's death most likely was around 10 p.m. on October 30, 1975. Jachimczyk's testimony was bolstered by the testimony of several people, including Dorothy Moxley, Ix and David Skakel, that they had heard dogs barking in the vicinity of the crime scene at approximately that time. See footnote 7 of this opinion.

[15] According to Littleton, he was unable to discern the cause of the disturbance.

I

We first address the defendant's claim that the court, Dennis, J. (juvenile court), improperly transferred his case from the docket for juvenile matters to the regular criminal docket of the Superior Court. Specifically, the defendant claims that the juvenile court improperly: (1) failed to require a complete investigation into the defendant's personal history and background in accordance with General Statutes (Rev. to 1975) §§ 17-60a[16] and 17-66,[17] which, at all times

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16 General Statutes (Rev. to 1975) § 17-60a provides: "The juvenile court shall have the authority to transfer to the jurisdiction of the superior court any child referred to it for the commission of a murder, provided any such murder was committed after such child attained the age of fourteen years. No such transfer shall be valid unless prior thereto the court has caused a complete investigation to be made as provided in section 17-66 and has found, after a hearing, that there is reasonable cause to believe that (1) the child has committed the act for which he is charged and (2) there is no state institution designed for the care and treatment of children to which said court may commit such child which is suitable for his care or treatment or (3) the safety of the community requires that the child continue under restraint for a period extending beyond his majority and (4) the facilities of the superior court provide a more effective setting for disposition of the case and the institutions to which said court may sentence a defendant are more suitable for the care or treatment of such child."

Hereinafter, all references to § 17-60a in this opinion are to the 1975 revision.

17 General Statutes (Rev. to 1975) § 17-66 provides: "Prior to the disposition of the case of any child found to be delinquent, investigation shall be made of the facts as herein specified by the probation officer, and until such investigation has been completed and the results thereof placed before the judge, no disposition of the child's case shall be made. Such

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relevant to this appeal, governed the transfer of a juvenile matter to the regular criminal docket of the Superior Court; (2) relied on the current regulations of the department of children and families (department) in concluding that there was no state institution suitable for the care and treatment of the defendant within the meaning of § 17-60a(2); and (3) failed to explore the existence of facilities outside the state suitable for the care and treatment of the defendant. We reject the defendant's claim that the juvenile court improperly transferred his case to the regular criminal docket of the Superior Court.[18]

The following facts and procedural history are relevant to our resolution of this claim. Because the defendant was fifteen years old at the time of the offense, he initially was charged as a delinquent in the Superior Court for Juvenile

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investigation shall consist of an examination of the parentage and surroundings of the child, his age, habits, and history, and shall include also an inquiry into the home conditions, habits and character of his parents or guardians. Where a child is or legally should be in attendance at school, it shall further contain a report of the child's school adjustment, which shall be furnished by the school officials to the court upon its request. The court shall, when it is found necessary to the disposition, cause a complete physical or mental examination, or both, to be made of the child by persons professionally qualified to do so."

Hereinafter, all references to § 17-66 in this opinion are to the 1975 revision.

[18] The state contends that the defendant is not entitled to appellate review of these claims because he failed to raise them in the juvenile court. We reject the state's contention because our review of the proceedings in the juvenile court indicates that these claims were raised, with adequate specificity, in that court.

Matters. The state subsequently filed a motion under § 17-60a to transfer the defendant's case to the regular criminal docket. The juvenile court thereafter conducted a hearing to determine whether, pursuant to § 17-60a, there was reasonable cause to believe that the defendant had committed the murder with which he had been charged. Following the presentation of evidence on that issue, the juvenile court concluded that there was reasonable cause to believe that the defendant had committed that offense.[19] The juvenile court also issued an order pursuant to § 17-60a directing that an investigation be conducted in accordance with § 17-66.

After the investigation was complete, the juvenile court reconvened the defendant's statutorily mandated transfer hearing for the purpose of addressing the remaining elements of § 17-60a. At the hearing, the parties elicited testimony from the supervisor of juvenile probation, Joseph Pacquin, who had been assigned to conduct the investigation required by § 17-60a. Pacquin acknowledged that his investigation had focused primarily on the possible availability of a state facility that would be suitable for the defendant, and not on the defendant's personal, family and educational background. See General Statutes (Rev. to 1975) § 17-66. Pacquin gave several reasons for failing to investigate the defendant's personal history and family background, notwithstanding the dictates of § 17-66, including the fact that the defendant was forty years of age at the time of the transfer hearing. With specific regard to the defendant's education, Pacquin testified that he had not looked into that facet of the defendant's background because § 17-66 does not require such a review unless the child is or legally should be attending school. Additionally, Pacquin testified that he had not sought a physical

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[19] The defendant does not challenge the juvenile court's reasonable cause finding on appeal.

or mental examination of the defendant because the court had not ordered such an examination to be conducted pursuant to § 17-66. With respect to possible residential and treatment alternatives, Pacquin testified that the department is the state agency solely responsible for the detention and treatment of juveniles, and that the department cannot lawfully accept for placement persons over the age of eighteen. Pacquin's testimony in this regard was consistent with the testimony of Judith Kallen, a program director employed by the department, who testified at the defendant's reasonable cause hearing that department regulations prohibited the commitment or placement of individuals over the age of eighteen into the care and custody of the department.

In support of his objection to the state's motion to transfer, defense counsel adduced testimony from Clinton Roberts, a former state probation officer and president of Alternative Sentencing Consultants, Inc., a private sentencing consulting firm. Roberts indicated that, contrary to the testimony of Pacquin, there is a private, nonprofit facility located in Newtown that admits both juveniles and adults, and that the Newtown facility might serve the residential treatment needs of the defendant. On cross-examination, however, Roberts conceded that the facility operated primarily as a substance abuse treatment center, and he could not say whether the facility was appropriate for the defendant. Defense counsel also elicited testimony that the state juvenile justice system occasionally places juveniles in programs located in other states, but that these placements are reserved for juveniles with special needs that cannot be met in programs located within the state.

In a memorandum of decision issued after the conclusion of the hearing, the juvenile court noted that, under the particular circumstances presented, the provisions of § 17-66 "are not totally applicable ...." The court further observed that department regulations prohibit the placement with the

department of anyone over the age of eighteen. The court also noted that, although General Statutes (Rev. to 1975) § 17-68(c)[20] provides for the commitment of a child directly to a hospital or other appropriate institution if the child is determined to be mentally ill, the issue of mental illness never was raised at any time by the defendant, and the record otherwise was devoid of any indication that the defendant suffered from any such illness. The court thereafter concluded that "there [was] no available or suitable state institution designed for the care and treatment of children to which the juvenile court could commit the ... forty year old [defendant] that would be suitable for his care and treatment, should he be adjudicated delinquent for the murder of [the victim]," and that "the facilities of the adult criminal division of the Superior Court afford[ed] and provide[ed] a more effective setting for the disposition of this case, and the institutions to which the adult criminal division of the Superior Court may sentence a defendant [were] more suitable for the care and treatment of this [defendant], should he be found guilty of the murder of [the victim]." Accordingly, the juvenile court transferred the case to the regular criminal docket.[21]

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[20] General Statutes (Rev. to 1975) § 17-68 provides in relevant part: "(c) Any child coming within the jurisdiction of the court, who is found to be mentally ill, may be committed by said court to a hospital or other institution empowered by law to treat mentally ill children; and, if the court adjudges a child to be delinquent and finds him to be mentally deficient, it may commit him to an institution for mentally deficient children or defective delinquents...."

Hereinafter, all references to § 17-68 in this opinion are to the 1975 revision.

[21] We note that the defendant filed an interlocutory appeal to the Appellate Court from the transfer order of the juvenile court, and we transferred the case to this court upon the joint motion of the parties. On appeal, we

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Before addressing the defendant's claims, we set forth the legal principles that govern our resolution of those claims. "There is no dispute that adjudication as a juvenile rather than prosecution as an adult carries significant benefits, chief among which are a determination of delinquency rather than criminality ... confidentiality ... limitations with respect to sentencing ... erasure of files ... and isolation from the adult criminal population." (Citations omitted.) *State v. Angel C.*, 245 Conn. 93, 103, 715 A.2d 652 (1998). Accordingly, "a juvenile in whom a liberty interest in his or her juvenile status has vested, has a substantial liberty interest in the continuation of that juvenile status and that the juvenile cannot and should not be deprived of that status without [proper] procedural protections ...." *Id.; see also Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) (juvenile court's failure to conduct full investigation, as required by statute, prior to juvenile's transfer to regular criminal docket resulted in deprivation of liberty without due process of law). Importantly, however, "[a]ny [special treatment] accorded to a juvenile because of his [or her] age with respect to proceedings relative to a criminal offense results from statutory authority, rather than from any inherent or constitutional right." (Internal quotation marks omitted.) *State v. Angel C., supra*, at 104, 715 A.2d 652. Accordingly, in the present matter, to the extent that the defendant possesses a liberty interest in his juvenile status, that interest derives from, and is limited by, the statutory provi-

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agreed with the state that the order of the juvenile court transferring the case to the regular criminal docket was not a final appealable judgment; *In re Michael S.*, 258 Conn. 621, 631, 784 A.2d 317 (2001); and, therefore, we dismissed the appeal. *Id.*

sions governing the transfer, adjudication and commitment of juveniles.

We turn next to the relevant statutory provisions. Under the statutory scheme in effect in 1975,[22] the juvenile court had original and exclusive jurisdiction "over all proceedings concerning uncared-for, neglected, dependent and delinquent children within this state ...." General Statutes (Rev. to 1975) § 17-59. Statutes governing the authority and proceedings of the juvenile court define a "child" as "any person under sixteen years of age," who may be found "delinquent" by the court if, inter alia, the child "has violated any federal or state law or municipal or local ordinance ...." General Statutes (Rev. to 1975) § 17-53. With respect to a child who has been referred to the juvenile court because that child allegedly had committed the crime of murder, § 17-60a authorizes the court to transfer the child to the regular criminal docket of the Superior Court provided that the child was at least fourteen years of age when the murder was committed. Such a transfer is not permitted by § 17-60a, however, unless an investigation of the child's personal and family background has been completed in accordance with § 17-66, and the juvenile court has determined, after a hearing, that there is reasonable cause to believe that: (1) the child has committed the crime charged; (2) there is no available state institution designed for the care and treatment of children that would be suitable for the child, or community safety requires that the child be detained in a custodial setting for a period extending beyond majority age; and (3) the facilities of the Superior Court provide a more effective setting for disposition of the case and

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22 As we previously have explained, the juvenile court applied the law in effect at the time of the commission of the offense. *See, e.g., In re Daniel H.*, 237 Conn. 364, 377, 678 A.2d 462 (1996). That determination has not been challenged by either party to this appeal.

the adult institutions to which the child may be sentenced are more appropriate for his or her care or treatment. With respect to the mandated investigation, General Statutes (Rev. to 1975) § 17-66 mandates that the required investigation include an examination of "the parentage and surroundings of the child, his age, habits, and history, and ... also an inquiry into the home conditions, habits and character of his parents or guardians."[23]

The defendant first claims that his transfer from the docket for juvenile matters to the regular criminal docket was improper because Pacquin did not conduct a complete investigation into the defendant's personal and family background as required by §§ 17-60a and 17-66. We agree with the defendant that Pacquin's investigation did not satisfy the requirements of § 17-66, and that, normally, a failure to meet those requirements would render invalid the transfer of any case from juvenile court to the regular criminal docket pursuant to § 17-60a. It also is clear, however, that a § 17-66 investigation is mandated by § 17-60a solely for the purpose of assisting the juvenile court in its determination of whether, under the circumstances, there exists a suitable state institution to which the child may be committed in preference to the facilities otherwise available for the treatment and punishment of adult offenders. In the present case, however, testimony adduced at the transfer hearing established that the age of the then forty year old defendant foreclosed his adjudication in juvenile court because the department was prohibited by state regulations[24] from accepting for placement anyone over the age of eighteen, regardless of whether such place-

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[23] Section 17-66 identifies other potential areas of investigation. See footnote 17 of this opinion. Those other areas, however, are not implicated by this appeal.

[24] *See* Regs., Conn. State Agencies § 17a-145-48(e).

ment would involve a custodial or noncustodial setting. Thus, the juvenile court necessarily would have concluded, irrespective of the results of a complete investigation in accordance with § 17-66, that the defendant's age mandated the transfer of his case to the regular criminal docket. Consequently, Pacquin's failure to complete the investigation contemplated by § 17-66, and the juvenile court's failure to consider facts that might have been brought to light upon the completion of that investigation, had no bearing on that court's ultimate decision under § 17-60a to transfer the defendant's case to the regular criminal docket.[25]

The defendant next claims that the juvenile court improperly relied on regulations of the department that were in effect at the time of the transfer hearing in concluding that

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[25] For the first time on appeal, the defendant claims that, if a complete § 17-66 investigation had been performed, the juvenile court might have concluded that the defendant suffers or suffered from a mental illness or deficiency and, on that basis, the juvenile court reasonably might have committed the defendant to a mental health facility pursuant to § 17-68(c). See footnote 20 of this opinion. We are not persuaded by this contention. First, at no time during the transfer stage of the proceedings in juvenile court did the defendant ever claim that he was mentally ill or deficient, and he never challenged the express finding of the juvenile court that there was nothing in the record to suggest that a mental health commitment was warranted. Second, the defendant concedes that the juvenile court could not have ordered him to undergo a physical or mental evaluation because the court was barred from doing so by Practice Book, 1963, § 1125(2) (Cum.Sup. 1974) (effective July 1, 1974), which provides that, subject to certain exceptions not applicable to the present case, "[n]o such examination ... shall be made of any child denying responsibility for [his or her allegedly] delinquent behavior ...." In such circumstances, the defendant's belated attempt to raise the possibility of a commitment under § 17-68(c) is unavailing.

there was no state institution suitable for his care and treatment. In particular, the defendant claims that the juvenile court's reliance on the regulations prohibiting the placement with the department of anyone over the age of eighteen thwarts the will of the legislature as expressed in the statutory scheme that was in effect in 1975, because that age limitation on placements with the department was not a part of the statutory scheme at that time.

General Statutes (Rev. to 1975) § 17-60a provides in relevant part that no transfer shall be valid unless the juvenile court finds that "there is no state institution designed for the care and treatment of children *to which [the] court may commit such child* which is suitable for his care or treatment ...." (Emphasis added.) We agree with the juvenile court that this statutory provision "narrowly focus[es] on the availability and suitability of state institutions 'designed for the care and treatment of children' to which the juvenile court *has authority to 'commit such child.'*" (Emphasis added.) Thus, under § 17-60a, the commitment alternatives available to the juvenile court are those alternatives available at the time of the transfer hearing.[26] Because the juvenile court properly considered those commitment options, and not the commitment options that might have been available in 1975, the defendant's claim must fail.

We also disagree with the defendant's final claim, namely, that the juvenile court improperly failed to explore the suitability of placing the defendant in an out-of-state institution. Under General Statutes (Rev. to 1975) § 17-420,

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[26] We note, moreover, that, in 1975, the legislature necessarily contemplated that the department would adopt and enforce regulations for the purpose of effectuating the statutory scheme relating to children because the legislature expressly had authorized the department to do so. See General Statutes (Rev. to 1975) § 17-415(b).

the commissioner of children and families (commissioner) may transfer "any person committed, admitted or transferred to the department ... to any private agency or organization within or without the state under contract with the department," provided that certain conditions are satisfied. Thus, a necessary prerequisite to the out-of-state transfer of a juvenile found to be delinquent is that the juvenile first must be "committed, admitted or transferred" to the care and custody of the department. As the trial court properly determined, however, under state law, no person over the age of eighteen may be committed to the care and custody of the department. Because the defendant could not be placed with the department, he could not be transferred by the commissioner to an out-of-state institution and, accordingly, the juvenile court properly declined to explore out-of-state placement alternatives for the defendant.

For the foregoing reasons, the defendant has failed to establish that the juvenile court improperly transferred his case to the regular criminal docket. Because that transfer was proper, the state's prosecution of the defendant as an adult was lawful.

II

The defendant next claims that the trial court improperly concluded that his prosecution for murder was not barred by the applicable statute of limitations. We disagree, albeit on the basis of an analysis that differs from that of the trial court.

The following factual and procedural background is necessary to our resolution of this claim. The defendant was arrested on January 19, 2000, for the October, 1975, murder of the victim and, as we have explained; see part I of this opinion; his case was transferred from the docket for juvenile matters to the regular criminal docket. Prior to trial, the defendant filed a motion to dismiss the information on the ground that his prosecution for murder was barred by the five

year limitation period of General Statutes (Rev. to 1975) § 54-193,[27] the statute of limitations that was in effect at the time of the victim's murder. The trial court, *Kavanewsky, J.*, denied the defendant's motion to dismiss, concluding that the five year limitation period of § 54-193, although facially applicable to all felonies, including murder and all other class A felonies, was inapplicable to the crime of murder.[28] The trial court acknowledged that § 54-193 contains no express exception for murder and that this court, in *State v. Paradise*, 189 Conn. 346, 350, 456 A.2d 305 (1983), had concluded that the 1976 amendment to § 54-193; Public Acts 1976, No. 76-35,

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[27] General Statutes (Rev. to 1975) § 54-193 provides: "No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time."

Hereinafter, all references to § 54-193 are to the 1975 revision unless otherwise indicated.

[28] The defendant filed a similar motion while his case was pending in the juvenile court. The juvenile court, however, concluded that the defendant's motion was premature because § 54-193 applies to prosecutions under the regular criminal docket of the Superior Court.

§ 1 (P.A. 76-35); which excepted all class A felonies, including murder, from the purview of § 54- 193, did not apply retroactively to offenses committed prior to April 6, 1976, the effective date of P.A. 76-35. The trial court further recognized that, in *Paradise*, we ultimately had determined, on facts materially identical to the facts of the present case, that the prosecution of the defendants for murder in that case was barred by the five year limitation period of the pre-1976 amendment version of § 54-193, the same version of § 54-193 that was in effect at the time of the murder of the victim in the present case. The trial court explained, however, that our determination in *Paradise* must be considered in light of two subsequent cases, *State v. Ellis*, 197 Conn. 436, 460, 497 A.2d 974 (1985),[29] and *State v. Golino*, 201 Conn. 435, 438-39, 518 A.2d 57 (1986), the holdings and rationale of which, in the trial court's view, lead to the conclusion that the five year limitation period of the pre-1976 amendment version of

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[29] The defendants in *Ellis* were Brian Ellis and Wilmer Paradise, the same defendants who, in *State v. Paradise, supra*, 189 Conn. 346, 456 A.2d 305, successfully had defended the trial court's dismissal of the murder charges that had been lodged against them. *Id.*, at 347, 456 A.2d 305; *see State v. Ellis, supra*, 197 Conn. at 438, 497 A.2d 974. The appeal in *Ellis* followed the decision by the state, after our decision in *Paradise*, to charge Ellis and Paradise with capital felony arising out of the same murder that had been the subject of the appeal in *Paradise*. Following the trial court's dismissal of the capital felony charges against Ellis and Paradise, the state appealed, and we reversed the judgment of the trial court, concluding, inter alia, that the prosecution of Ellis and Paradise was not barred by the five year limitation period of the pre-1976 amendment version of § 54-193. *State v. Ellis, supra*, at 460, 497 A.2d 974.

§ 54-193 was inapplicable to the crime of murder.[30] The trial court therefore denied the defendant's motion to dismiss,

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30 In *Paradise*, the sole issue presented was whether P.A. 76-35, which, as we have explained, expressly excepted all class A felonies, including murder, from the five year limitation period otherwise applicable to felonies, applied retroactively to offenses committed prior to the effective date of that amendment, that is, April 6, 1976. *State v. Paradise, supra*, 189 Conn. at 347, 456 A.2d 305. After concluding that the amendment had prospective effect only; *id.*, at 350, 456 A.2d 305; we affirmed the judgment dismissing the murder charges, which was based on the trial court's application of the five year limitation period of the pre-1976 amendment version of § 54-193. In light of the narrow issue raised by the parties in *Paradise*, we had no occasion expressly to consider, in that case, whether the legislature had intended to subject the offense of murder to the five year limitation period of the pre-1976 amendment version of § 54-193; rather, we assumed, like the parties, that the limitation period applied equally to murder as to all other felonies. Thereafter, in *Ellis*, we were required to decide whether the five year limitation period of the pre-1976 amendment version of § 54-193 applied to the offense of capital felony. *See State v. Ellis, supra*, 197 Conn. at 441, 497 A.2d 974. After undertaking a detailed historical analysis of this state's criminal statutes of limitation, we concluded that the statutory scheme governing capital felonies was not intended to upset the "deep-rooted understanding"; *id.*, at 459, 497 A.2d 974; that capital crimes, because of their gravity, are not subject to repose. *Id.*, at 459-60, 497 A.2d 974. We reached a similar conclusion in *State v. Golino, supra*, 201 Conn. 435, 518 A.2d 57. In *Golino*, this court considered the claim of the defendant, Anthony Golino, that his prosecution for a 1973 murder in violation of General Statutes (Rev. to 1972) § 53a-54(a) was barred by the five year limitation period of the pre-1976 amendment version of § 54-193 because Golino had not been charged with that murder until 1984. In contrast to the 1975 revision of the murder statute under which the defendants in *Ellis* were charged, the 1972 revision of the murder statute under which Golino was

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and the case proceeded to trial, following which a jury found the defendant guilty of murder.

In support of his claim that the trial court improperly declined to dismiss the information as time barred, the defendant maintains that this case is both factually and legally indistinguishable from *State v. Paradise*, *supra*, 189 Conn. 346, 456 A.2d 305, which, the defendant asserts, is therefore controlling and requires the dismissal of the information in the present case. The state asserts that we should overrule our holding in *Paradise* that P.A. 76-35, § 1, did not apply retroactively, a conclusion that was predicated on our determination that criminal statutes of limitation presumptively have prospective applicability only. *See id.*, at 351-53, 456 A.2d 305. Alternatively, the state maintains that the trial court cor-

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charged effectively had been declared unconstitutional by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). As we explained in *Golino*, the then applicable murder statute carried a possible penalty of death; *State v. Golino*, *supra*, at 439, 518 A.2d 57; *see* General Statutes (Rev. to 1972) § 53a-54 (c); and, therefore, for statute of limitation purposes, we treated the case as one "punishable by death ...." (Internal quotation marks omitted.) *State v. Golino*, *supra*, at 447, 518 A.2d 57. We further concluded that, although the state was barred by *Furman* from seeking the death penalty against Golino, that fact did not affect the conclusion, based on our historical analysis, that we had reached in *Ellis*, namely, that the legislature never intended for capital crimes, because of their gravity, to be subject to any period of limitation. *See id.*, at 444-45; 518 A.2d 57. The trial court in the present case relied heavily on the historical analysis that we employed in *Ellis* and *Golino* in concluding that, despite the broad language of the pre-1976 amendment version of § 54-193, the legislature never intended to establish a limitation period for the offense of murder because of the gravity of *that* offense.

rectly concluded that *Paradise* does not bar the state's prosecution of the defendant for murder because our determination in *Paradise* that the murder prosecutions in that case were time barred rested on a faulty assumption, namely, that the five year limitation period of the pre-1976 amendment version of § 54-193 applied to murder as well as to all other felonies. *See* footnote 30 of this opinion.

Upon reconsideration, we are persuaded that *Paradise* was wrongly decided. In particular, we conclude that we were misguided in establishing a presumption that, in the absence of a contrary indication of legislative intent, an amendment to a criminal statute of limitations is not to be applied retroactively. As we explain more fully hereinafter, we are convinced that, with respect to those offenses for which the preamendment limitation period has not expired, it is far more likely that the legislature intended for the amended limitation period to apply to those offenses. In view of the fact that the five year limitation period of the pre-1976 amendment version of § 54-193 had not expired with respect to the October, 1975 murder of the victim when the 1976 amendment to that statutory provision became effective, we conclude that P.A. 76-35, § 1, is the operative statute of limitations for purposes of this case.[31] Because, under

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31 In light of our conclusion that P.A. 76-35, § 1, applies to the offense in the present case, we have no reason to address the state's alternate contention that the legislature never intended to establish a limitation period for murder and, consequently, that the five year limitation period of the pre-1976 amendment version of § 54-193, despite its facial applicability to *all* felonies, including murder, does not bar the state's prosecution of the defendant for the murder of the victim. Indeed, this court is bound to consider *first* the state's claim that P.A. 76-35, § 1, applies retroactively to the offense in the present case because, if that claim has merit, P.A. 76-35, § 1, necessarily trumps the possible applicability of the pre-1976

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P.A. 76-35, § 1, there is no time period within which murder and other class A felonies must be prosecuted, the trial court properly denied the defendant's motion to dismiss the information.

We begin our analysis of this issue with a brief overview of the pertinent statutory provisions. The defendant was convicted of murder in violation of § 53a-54a, which, in 1975, specified that the offense "is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a" General Statutes (Rev. to 1975) § 53a-54a(c). Because the defendant was not charged with capital murder,[32] his offense was punishable as a class A felony, which, pursuant to General Statutes (Rev. to 1975) § 53a-35(b)(1), carries a maximum sentence of life imprisonment. At the time of the offense in October, 1975, General Statutes (Rev. to 1975) § 54-193 provided in relevant part: "No person shall be prosecuted ... for any crime or misdemeanor of which the punishment is or may be imprisonment ... except within five years next after the offense has been committed...." In 1976, however, the legislature amended § 54-193 to provide: "No person shall be prose-

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amendment version of § 54-193. Because we conclude that P.A. 76-35, § 1, does, indeed, have retrospective applicability to the offense in the present case, the issue of whether the legislature intended for the pre-1976 limitation period of § 54-193 to apply to murder is a moot question for purposes of this case. For purposes of our analysis and resolution of the issue presented, however, we assume, without deciding, that the five year limitation period of the pre-1976 amendment version of § 54-193 applies to murder.

32 There is no dispute that the murder of the victim in the present case did not give rise to a charge of capital murder.

cuted for any offense, except a capital felony or a class A felony for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed.... There shall be no limitation of time within which a person may be prosecuted for a capital felony or a class A felony." P.A. 76-35, § 1.

We next turn to a review of our relevant prior precedent construing legislative amendments to criminal statutes of limitation, beginning with *Paradise*. In *Paradise*, the defendants, Brian Ellis and Wilmer Paradise, were charged, in 1981, with murder, felony murder and kidnapping, all class A felonies, in connection with a murder that had been committed in 1974. *State v. Paradise*, *supra*, 189 Conn. at 347, 456 A.2d 305. The trial court dismissed the charges against Ellis and Paradise; *id.*, at 348, 456 A.2d 305; concluding that their prosecutions were barred by the five year limitation period of the pre-1976 amendment version of § 54-193, which was in effect at the time of the offenses. *See id.*, at 350, 456 A.2d 305. On appeal, the state claimed that P.A. 76-35, § 1, which excluded class A felonies, including murder, from the purview of the five year limitation period of § 54-193, was procedural in nature and, therefore, had retroactive applicability absent a contrary legislative intent. *Id.* In support of its position, the state relied primarily on "an extensive body of civil case law"; *id.*; in which this court had held that "procedural statute[s] ... ordinarily will be applied retroactively without a legislative imperative to the contrary ...."[33] *Id.*, at 351, 456 A.2d 305.

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[33] In *Paradise*, the state maintained that the retroactive application of the 1976 amendment to § 54-193 did not affect Paradise's or Ellis' substantive rights because, at the time that they allegedly had committed the murder with which they were charged, the five year limitation period of the pre-1976 amendment version of § 54-193 had not yet expired. *See*

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We declined, however, to decide whether the 1976 amendment was substantive or procedural. *Id.*, at 353, 456 A.2d 305. Although we reaffirmed "the continued vitality and utility of the principle that procedural statutes will be applied retrospectively absent a contrary legislative intent in the civil field"; *id.*, at 351, 456 A.2d 305; we concluded that this tenet was inapplicable to criminal statutes in light of the principle that such statutes "must be strictly construed." *Id.*, at 352, 456 A.2d 305. In accordance with this principle, we concluded that "criminal statutes are not to be accorded retrospective effect absent language clearly necessitating such a construction...."[34] *Id.*, at 353, 456 A.2d 305. After observing that § 54-193 must be strictly construed because it is "penal in nature"; *id.*, at 352, 456 A.2d 305; we explained that, because the language of P.A. 76-35, § 1, did not indicate "a clear legislative intent that the statute have a retrospective effect"; *id.*, at 353, 456 A.2d 305; it could not be applied ret-

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State v. Paradise, Conn. Supreme Court Record & Briefs, December Term, 1982, Pt. 2, State's Brief p. 5.

34 Our conclusion in *Paradise* that criminal statutes are not subject to retroactivity analysis on the basis of whether they are substantive or procedural was predicated on *State v. Jones*, 132 Conn. 682, 47 A.2d 185 (1946), a case in which this court had concluded that a statute requiring the examination of certain criminal defendants for venereal disease was not retroactive in light of the general principle that, "in a criminal case a retrospective construction of a statute should not be adopted unless its language clearly makes such a construction necessary." (Internal quotation marks omitted.) *Id.*, at 685, 47 A.2d 185. We nevertheless acknowledged in *Paradise*--albeit without elaboration or specification--that "[t]he civil-criminal distinction enunciated in *Jones* and affirmed [in *Paradise*], is not necessarily applicable to other areas of the criminal process." *State v. Paradise*, *supra*, 189 Conn. at 353 n.5, 456 A.2d 305.

roactively to conduct that had preceded its effective date. *See id.* In view of the fact that all of the parties in *Paradise* had proceeded on the assumption that the five year limitation period of the pre-1976 amendment version of § 54-193 applied to all felonies, including murder, we affirmed the judgment of the trial court dismissing the information as time barred.

In *State v. Crowell*, 228 Conn. 393, 398-99, 636 A.2d 804 (1994), we expressly reaffirmed our conclusion in *Paradise* that criminal statutes of limitation are accorded prospective effect only. The sole issue presented in *Crowell* was whether the seven year limitation period of General Statutes (Rev. to 1993) § 54-193a was applicable to the state's prosecution of the defendant, Martin Crowell, for offenses relating to his alleged sexual molestation of a child when the amendment establishing that seven year limitation period became effective after the commission of the charged offenses but prior to the expiration of the preamendment five year limitation period. *Id.*, at 394-95, 636 A.2d 804. In urging this court to overrule *Paradise*, the state maintained that our holding in that case was "based on the faulty premise that a statute of limitations that extends a previous limitation period before that previous period has expired is 'retroactive.'" *Id.*, at 398, 636 A.2d 804. Specifically, the state claimed that, "to be 'retroactive,' a statute must affect a 'vested right' that existed on the date it took effect. Because a defendant has no right to a statute of limitations defense while the original limitation period remains unexpired, a new statute of limitations that takes effect before the original limitations period has expired does not affect a vested right and therefore cannot be retroactive." *Id.* We rejected the state's claim, noting that "[t]he holding in *Paradise* was based firmly on the principle that criminal statutes must be strictly construed ... [and] not, as the state claims, on a technical misunderstanding of the nature of retroactivity." (Citation omitted.) *Id.*, at 399, 636 A.2d 804. Because there was nothing in the language of the amendment to indicate that the extended limitation period

had retrospective effect, we concluded that the trial court properly had followed the dictates of *Paradise* in dismissing as time barred the charges against Crowell.

The next case relevant to our inquiry is *In re Daniel H.*, 237 Conn. 364, 678 A.2d 462 (1996), in which this court addressed the issue of whether a 1994 amendment to General Statutes § 46b-127, the mandatory juvenile transfer statute, had retroactive applicability. *See id.*, at 366-67, 678 A.2d 462. We concluded that the 1994 amendment, which eliminated the right to an immediate appeal from a court order transferring a juvenile matter to the regular criminal docket, had prospective effect only. *See id.*, at 378, 678 A.2d 462. In so concluding, we explained, first, that our resolution of the issue was guided by the canon of strict construction applicable to criminal statutes.[35] *Id.*, at 373, 678 A.2d 462. In contrast to *Paradise*, however, that conclusion did not end our analysis. After noting that, under General Statutes § 55-3,[36] substantive changes to the law presumptively have prospective application only; *id.*, at 372, 678 A.2d 462; we stated that "[t]he first step in ascertaining whether the 1994 amendment was intended to apply retroactively ... is to decide whether the removal of a juvenile's ability to appeal immediately from a court's transfer order is a substantive change in the law." *Id.*, at 373, 678 A.2d 462. We answered

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35 We observed that, although statutes concerning juvenile matters generally are considered to be civil in nature, statutes relating to alleged criminal misconduct of juveniles, such as § 46b-127, are subject to the canon of strict construction applicable to criminal statutes. *In re Daniel H.*, *supra*, 237 Conn. at 373, 678 A.2d 462.

36 General Statutes § 55-3 provides: "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect."

that question in the affirmative and, therefore, concluded that the change presumptively had prospective applicability only. *Id.*, at 375-76, 678 A.2d 462. We further determined that, because the presumption of prospective applicability was not rebutted by a clear expression of legislative intent to the contrary, the amendment did not apply retroactively. *Id.*, at 376, 678 A.2d 462.

Thereafter, in *State v. Parra*, 251 Conn. 617, 619-20, 741 A.2d 902 (1999), we considered whether a statutory amendment limiting the time within which a defendant may move to vacate a judgment and withdraw a previously entered plea properly was applied to crimes committed prior to the effective date of the amendment. The defendant, Juan Parra, relied on *Paradise* in support of his claim that the amendment could not operate retroactively because it lacked explicit statutory language requiring such an application. *Id.*, at 622, 741 A.2d 902. Although we acknowledged that "*Paradise* created a bright line rule on matters involving the statutory construction of criminal statutes ... namely, that the language of the statute itself must clearly necessitate a retrospective construction for one to be given"; (citation omitted; internal quotation marks omitted) *id.*, at 624, 741 A.2d 902; we nevertheless reasoned that "the breadth of [our] holding in *Paradise*"; *id.*; is limited to "certain types of criminal statutes, such as a statute of limitations for the prosecution of a crime ...." *Id.*, at 625, 741 A.2d 902. In reaching this conclusion, we noted that, in *In re Daniel H.*, we previously had "made clear that there are instances in which ... *Paradise* ... [does not prevent] this court from considering the legislative history of a criminal statute in determining whether such a statute should be applied retroactively." *State v. Parra*, *supra*, at 625, 741 A.2d 902. As we explained in *Parra*, "[i]n *In re Daniel H.*, we determined whether a statutory amendment eliminating the right to an immediate appeal from an order transferring a juvenile matter to the regular criminal docket applied retroactively.... While we specifically held

that the statutory amendment at issue was a criminal statute that affected substantive rights ... we, nonetheless, looked to its legislative history to determine whether the amendment should be applied retroactively.... Thus, we did not limit our analysis to a determination of whether the language of the amendment clearly necessitated a retrospective application, but, rather, used the normal tools of statutory construction to determine the legislature's intent on the issue of retroactive application of the amendment." (Citations omitted.) *Id.*

We further explained that the amendment at issue in *Parra* fell within "those other areas of the criminal process ... to which the holding of *Paradise* does not extend"; (citation omitted; internal quotation marks omitted) *id.*, at 626, 741 A.2d 902; because the provision "affect[ed] an area of the criminal process far removed from the actual criminal conduct for which the defendant originally was charged. For example, [the amendment did] not change the elements of the crime with which the defendant was charged, alter the elements of his defense to that crime or make more burdensome the punishment for that crime, after its commission." *Id.* Accordingly, we concluded that we were not restricted to the language of the amendment in determining whether the legislature had intended that it be applied retroactively; rather, the "proper test ... [was] whether the language of [the amendment] or its legislative history ... indicates that the legislature clearly and unequivocally intended for the statute to apply retroactively." *Id.*, at 627, 741 A.2d 902. We noted, finally, that, because the pertinent legislative history evinced a clear legislative intent to apply the amendment retroactively; *id.*, at 628, 741 A.2d 902; it was not necessary to determine whether the amendment was substantive or procedural. *Id.*, at 628 n.8, 741 A.2d 902.

With this background in mind, we now reexamine our conclusion in *Paradise* that P.A. 76-35, § 1, has prospective effect only. As we explain hereinafter, that conclusion is

fundamentally flawed because it is founded solely on the mistaken premise that the rule of strict construction bars the presumption of retroactivity otherwise applicable to amendments to statutes of limitation. In view of our determination that our conclusion in *Paradise* rested on a faulty premise, we are obliged to take a fresh look at the issue of whether a criminal statute of limitations should be applied retroactively or prospectively in circumstances such as those of the present case, in which the legislature has not clearly evinced an intent one way or the other. For the reasons that follow, we conclude that, with respect to those criminal offenses for which the applicable preamendment statute of limitations period has not yet expired, an amendment to that statute of limitations is presumptively retroactive. Because the limitation period of the pre-1976 amendment version of § 54-193 had not expired with respect to the offense in the present case prior to the effective date of the 1976 amendment, and because the legislature did not evince an intent to have the amendment apply prospectively only, we conclude that P.A. 76-35, § 1, provides the operative statute of limitations in the defendant's case.

Of course, our ultimate objective in construing statutes is to discern and effectuate the apparent intent of the legislature. *E.g.*, *Cogan v. Chase Manhattan Auto Financial Corp.*, 276 Conn. 1, 7, 882 A.2d 597 (2005); *State v. Ledbetter*, 263 Conn. 1, 12, 818 A.2d 1 (2003). Although that objective is the same for both civil and criminal statutes, we have recognized that certain principles of statutory construction bear special relevance to our interpretation of criminal statutes, one of which is the rule of strict construction. Thus, it has long been held that, "unless a contrary interpretation would frustrate an evident legislative intent, criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state." (Internal quotation marks omitted.) *State v. Reynolds*, 264 Conn. 1, 69, 836 A.2d 224 (2003), *cert. denied*, 541 U.S. 908, 124 S.Ct. 1614,

158 L.Ed.2d 254 (2004). Indeed, the rule, which "is perhaps not much less old than construction itself"; *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820); finds its roots in Sir Edward Coke's opinion in *Heydon's Case*, 76 Eng. Rep. 637 (Ex. 1584); *see* M. Radin, "A Short Way with Statutes," 56 Harv. L.Rev. 388, 389 (1942); and, in this state, it can be traced back to at least 1821. *See Daggett v. State*, 4 Conn. 60, 63 (1821). Succinctly stated, "[t]he purpose of the rule of strict construction is ... to enable the people of the State to know clearly and precisely what acts the legislature has forbidden under a penalty, that they may govern their conduct accordingly, and to make sure that no act which the legislature did not intend to include will be held by the courts within the penalty of the law." *State v. Faro*, 118 Conn. 267, 274, 171 A. 660 (1934); accord *State v. Zazzaro*, 128 Conn. 160, 167, 20 A.2d 737 (1941). "Strict construction is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions that would expose them to liability for penalties and what the penalties would be." 3 J. Sutherland, Statutes and Statutory Construction (6th Ed. Singer 2001) § 59:3, p. 142. "Another reason for strict construction is to protect the individual against arbitrary discretion by officials and judges.... A related argument is to the effect that since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty whe[n] the legislature had not clearly and unequivocally prescribed it." *Id.*, pp. 144-45.

The requirement that criminal statutes shall be strictly construed is therefore predicated on two fundamental principles. First, the public is entitled to fair notice of what the law forbids. Second, legislatures and not courts are responsible for defining criminal activity. Neither of these two principles is advanced, however, by applying the rule of strict construc-

tion to criminal statutes of limitation. Because the statutory limitation period has nothing to do with the scope or reach of the substantive offense, neither the public's right to fair warning of the legislatively proscribed conduct nor the risk that the offense will be enlarged judicially beyond the contemplation of the legislature is implicated by the statutory limitation period. Consequently, applying the rule of strict construction to criminal statutes of limitation would be "[t]o enforce the rule beyond its purpose [and, thereby] to exalt technicalities above substance." *State v. Faro*, *supra*, 118 Conn. at 274, 171 A. 660.

Indeed, because criminal statutes of limitation do not define criminal conduct, establish the punishment to be imposed or otherwise burden defendants, such statutes are not truly penal at all. *See, e.g., Commonwealth v. George*, 430 Mass. 276, 279, 717 N.E.2d 1285 (1999) ("[s]tatutes of limitation do not define criminal conduct, are not penal statutes, and may not be subject to ... strict construction against the [state]"). In fact, such statutes represent an expression of "legislative grace"; *State v. Hodgson*, 108 Wash.2d 662, 667, 740 P.2d 848 (1987), *cert. denied sub nom. Fied v. Washington*, 485 U.S. 938, 108 S.Ct. 1117, 99 L.Ed.2d 277 (1988); for "they are a surrendering by the sovereign of its right to prosecute"; *id.*; after a specified period of time has elapsed from the acts constituting the offense. Put differently, because such statutes inure to the *benefit* of criminal defendants, it is illogical to characterize those statutes as penal for purposes of determining the proper approach to their construction.

In *Paradise*, we did not explain our conclusion that § 54-193 is penal in nature, and, therefore, that that provision must be strictly construed. Indeed, we cited only one case, namely, *State v. Anonymous (1976-6)*, 33 Conn.Supp. 34, 358 A.2d 691 (1976) (*Anonymous*), to support that conclusion. *See State v. Paradise*, *supra*, 189 Conn. at 352, 456 A.2d 305. In

State v. Anonymous (1976-6), *supra*, at 39, 358 A.2d 691, a judge of the Court of Common Pleas[37] concluded, also without analysis or explanation, that § 54-193 is a penal statute and, therefore, subject to the canon of strict construction. In support of its assertion that § 54-193 is a penal statute, the court in *Anonymous* relied solely on *State v. Bello*, 133 Conn. 600, 53 A.2d 381 (1947), a case in which this court affirmed the conviction of the defendant, Riggs Bello, for gambling. *See id.*, at 601, 604, 53 A.2d 381. In *Bello*, however, we applied the canon of strict construction in connection with our interpretation of the antigambling statute itself, not any applicable statutory limitation period. *See id.*, at 604, 53 A.2d 381. Thus, the cases that provide the basis for our conclusion in *Paradise* that § 54-193 is a penal statute to which the canon of strict construction applies simply do not support that conclusion.

Contrary to our determination in *Paradise*, § 54-193, like other criminal statutes of limitation, is *remedial* in nature. "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970). Indeed, it is because of the remedial nature of criminal statutes

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[37] The Court of Common Pleas was merged into the Superior Court in 1978. See General Statutes § 51-164s.

of limitation that they "are to be liberally interpreted in favor of repose."[38] (Internal quotation marks omitted.) *Id.*, at 115, 90 S.Ct. 858.

In *Paradise*, the rule of strict construction provided the sole basis for our determination that P.A. 76-35, § 1, has prospective effect only. *See State v. Paradise*, *supra*, 189 Conn. at 352, 456 A.2d 305. Because we are not persuaded that that rule applies to criminal statutes of limitation, the validity of our holding in *Paradise* necessarily is suspect.[39] Even if we

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[38] Thus, like all remedial statutes, a criminal statute of limitation must be construed liberally to effectuate the legislature's intent. *See, e.g., Knight v. F.L. Roberts & Co.*, 241 Conn. 466, 474, 696 A.2d 1249 (1997); *Dysart Corp. v. Seaboard Surety Co.*, 240 Conn. 10, 18, 688 A.2d 306 (1997). Because the remedial purpose of a criminal statute of limitation is to provide for repose after the expiration of a specified period of time, the statute must be construed liberally to effectuate that purpose. This maxim of liberal construction, however, is not determinative of whether the *pre*-1976 amendment version or the *post*-1976 amendment version of § 54-193 applies to the criminal conduct that is the subject of the present case because *both* provisions represent a legislative mandate; the question is which such mandate applies. Of course, once it has been determined *which* provision is applicable, then that provision must be liberally construed in favor of repose. But until such time as the applicable statute is identified, the doctrine of liberal construction has no applicability. Thus, although in *Paradise*, we referred to this tenet of statutory construction; *State v. Paradise*, *supra*, 189 Conn. at 352, 456 A.2d 305; it provides no guidance on the issue of whether the pre-1976 amendment or the post-1976 amendment version of § 54-193 applies to the defendant's conduct.

[39] We also note that our holding in *Paradise* leads to a result that is inconsistent with the rationale underlying that holding when it is applied to a statutory amendment that *reduces* the limitation period. In such circumstances, the prospective application of the amendment would inure to

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were to assume that the rule is applicable to such statutes, however, we see no reason why its application would lead inexorably to the presumption against retroactivity that we announced in *Paradise*. Indeed, as we had recognized long before *Paradise*, "[t]he rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent." (Internal quotation marks omitted.) *State v. Faro*, *supra*, 118 Conn. at 274, 171 A. 660. In other words, the principle of strict construction should not be applied in a manner that is "hostile" to an evident legislative purpose; *State v. Levy*, 103 Conn. 138, 141, 130 A. 96 (1925); or in a way that is contrary to common sense. *See State v. Reynolds*, *supra*, 264 Conn. at 70, 836 A.2d 224. Thus, as a leading commentator on statutory construction has explained, "[t]he rule of strict construction is not the only factor which influences the interpretation of [criminal] laws. Instead, the rule is merely one among various aids which may be useful in determining the meaning of penal laws. This has been recognized time and again by the decisions, which frequently enunciate the principle that the intent of the legislature, or the meaning of the statute, must govern and that a strict construction should not be permitted to defeat the policy and purposes of the statute." 3 J. Sutherland, *supra*, § 59:6, pp. 159-61. At a minimum,

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the *detriment* of the defendant because the original, longer limitation period presumptively would be applicable. This result is incompatible with the rationale of our holding in *Paradise*, namely, the rule of strict construction, a rule that, when applicable, requires us to construe statutes against the state and in favor of criminal defendants. The bizarre nature of this result substantiates our rejection of the rote application of the rule of strict construction to criminal statutes of limitation in *Paradise*.

therefore, our reliance in *Paradise* on the canon of strict construction, to the exclusion of all other considerations, casts serious doubt on the validity of our conclusion.[40]

For the foregoing reasons, we reject as logically unfounded our holding in *Paradise* that the canon of strict construction requires the conclusion that P.A. 76-35, § 1, has prospective effect only. We therefore must determine whether our conclusion in *Paradise* nevertheless was correct. We conclude that it was not.

It is axiomatic that, "[w]hether to apply a statute retroactively or prospectively depends upon the intent of the legislature in enacting the statute." (Internal quotation marks omitted.) *In re Eden F.*, 250 Conn. 674, 695, 741 A.2d 873 (1999). In seeking to discern that intent, "[o]ur point of departure is ... § 55-3,[41] which ... we have uniformly interpreted ... as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only.... The Legislature only rebuts this presumption when it clearly and unequivocally expresses its intent that the legislation

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40 As we previously have noted, in *State v. Crowell*, *supra*, 228 Conn. 393, 636 A.2d 804, this court reaffirmed our holding in *Paradise*, stating: "After a thorough consideration of the parties' arguments in ... *Paradise* ... and the reasoning behind that decision, we conclude that it should not be overruled." *Id.*, at 399, 636 A.2d 804. We then expressed our approval of the rationale on which our holding in *Paradise* was based, namely, "the principle that criminal statutes must be strictly construed ...." Id. These conclusory assertions in *Crowell* notwithstanding, we engaged in *no* analysis or explanation as to why the rule of strict of construction constituted a sound basis for our determination that criminal statutes of limitation presumptively have prospective effect only. Consequently, *Crowell* is no more persuasive a precedent than is *Paradise*.

41 *See* footnote 36 of this opinion.

shall apply retrospectively."[42] (Internal quotation marks omitted.) *Rice v. Vermilyn Brown, Inc.*, 232 Conn. 780, 786, 657 A.2d 616 (1995); *see also Coley v. Camden Associates, Inc.*, 243 Conn. 311, 316, 702 A.2d 1180 (1997). As a corollary to this principle, we also "have presumed that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary ...."[43] *Miano v. Thorne*, 218 Conn. 170, 175, 588 A.2d 189 (1991); accord *In re Daniel H., supra*, 237 Conn. at 372-73, 678 A.2d 462. "While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a

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42 "[This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." (Internal quotation marks omitted.) *State v. Faraday*, 268 Conn. 174, 196, 842 A.2d 567 (2004), quoting *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

43 Since our decision in *Paradise*, we repeatedly have recognized the utility of this approach to statutory construction as a guide to determining whether the legislature intended for a particular criminal statute to have retrospective effect. *See, e.g., State v. Faraday*, 268 Conn. 174, 197, 842 A.2d 567 (2004); *In re Michael S.*, 258 Conn. 621, 630, 784 A.2d 317 (2001); *State v. Parra, supra*, 251 Conn. at 628 n.8, 741 A.2d 902; *In re Daniel H., supra*, 237 Conn. at 372, 678 A.2d 462. Indeed, as we have explained, in *Paradise*, we acknowledged the applicability of this approach in regard to certain unspecified "areas of the criminal process." *State v. Paradise, supra*, 189 Conn. at 353 n.5, 456 A.2d 305.

procedural law prescribes the methods of enforcing such rights or obtaining redress." (Internal quotation marks omitted.) *Carr v. Planning & Zoning Commission*, 273 Conn. 573, 593, 872 A.2d 385 (2005). Moreover, the "retroactive application of a law occurs only if the new or revised law was not yet in effect on the date that the relevant events underlying its application occurred." *State v. Faraday*, 268 Conn. 174, 197, 842 A.2d 567 (2004); *see also State v. Breton*, 264 Conn. 327, 421-22, 824 A.2d 778, *cert. denied*, 540 U.S. 1055, 124 S.Ct. 819, 157 L.Ed.2d 708 (2003); *In re Daniel H.*, *supra*, at 377, 678 A.2d 462. Finally, in determining the retrospective applicability of any criminal statute, we must be mindful that the ex post facto clause of the United States constitution[44] bars any state from enacting "any law [that] imposes a punishment for an act [that] was not punishable at the time [that] it was committed; or imposes additional punishment to that then prescribed." (Internal quotation marks omitted.) *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Although "a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution"; (emphasis in original) *Stogner v. California*, 539 U.S. 607, 632-33, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003); because it deprives the defendant of a fully vested defense to prosecution, the constitution "does *not* prevent the State from extending time limits ... for prosecutions not yet time barred."[45] (Emphasis added.) *Id.*, at 632, 123 S.Ct. 2446.

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44 The constitution of the United States, article one, § 10, provides in relevant part: "No State shall ... pass any ... ex post facto Law ...."

45 In *Stogner*, the United States Supreme Court considered the constitutionality of a statute of limitations that, as applied to the defendant, Marion Stogner, revived a prosecution that had been time barred under

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Application of these considerations leads unmistakably to the conclusion that, subject to the limitations of the ex post facto clause, criminal statutes of limitation, including P.A. 76-35, § 1, should be accorded a presumption of retroactivity. Indeed, we long have held that civil statutes of limitation are presumed to apply retroactively because they do not affect or alter substantive rights. *Roberts v. Caton*, 224 Conn. 483, 488, 619 A.2d 844 (1993); *see, e.g., Jones Destruction, Inc. v. Upjohn*, 161 Conn. 191, 195-96, 286 A.2d 308 (1971). As we have explained, "[a] statute of limitations is generally considered to be procedural, [and therefore presumptively retroactive] especially whe[n] the statute contains only a limitation as to time with respect to a right of action and does not itself create the right of action." (Internal quotation marks omitted.) *Moore v. McNamara*, 201 Conn. 16, 22, 513 A.2d 660 (1986); accord *Roberts v. Caton, supra*, at 488, 619 A.2d 844. "This is so because ... the limitation merely acts as a bar to a remedy otherwise available." *Moore v. McNamara, supra*, at 22, 513 A.2d 660. The fundamental purpose and effect of criminal statutes of limitation are the same as

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the original limitation period that was in effect when Stogner allegedly had committed the crimes with which he was charged. *Stogner v. California, supra*, 539 U.S. at 609, 123 S.Ct. 2446. The court concluded that the statute as applied violated the ex post facto clause because it "retroactively withdr[ew] a complete defense to prosecution after it ha[d] already attached"; *id.*, at 632, 123 S.Ct. 2446; thereby rendering Stogner subject to punishment under the new law for past criminal conduct for which he was not subject to punishment when the new law was enacted. *See id.*, at 613, 123 S.Ct. 2446. The court also made clear, however, that the extension of a statute of limitations to offenses not barred by a previous limitation period does not implicate the ex post facto clause. *Id.*, at 632, 123 S.Ct. 2446.

civil statutes of limitation; as the United States Supreme Court has stated in noting the similarities between such statutes, they both "represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Internal quotation marks omitted.) *United States v. Marion*, 404 U.S. 307, 322-23 n.14, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Because both criminal and civil statutes of limitation are predicated on the same general policy considerations and perform the same basic functions, it makes sense to treat them the same for the purpose of determining whether they give rise to a presumption of retroactive or prospective applicability, at least in the absence of good reason not to do so.

We know of no such reason. Unless the statute of limitations that was in effect when a crime was committed has expired with respect to that crime, a defendant accused of that crime has no right to have that limitation period applied to his conduct. Succinctly stated, "[s]tatutes of limitations are measures of public policy only. They are entirely subject to the will of the legislature, and may be changed or repealed altogether in any case [in which] a right to acquittal has not been absolutely acquired by the completion of the [original] period of limitation. Such a statute is an act of grace in criminal prosecutions. The State makes no contract with criminals at the time of the passage of acts of limitations that they shall have immunity from punishment if not prosecuted within the statutory period." (Internal quotation marks omitted.) *People v. Isaacs*, 37 Ill.2d 205, 229, 226 N.E.2d 38 (1967); accord *State v. Petrucelli*, 156 Vt. 382, 383, 592 A.2d 365 (1991); *see also State v. Hodgson*, *supra*, 108 Wash.2d at 668, 740 P.2d 848 ("until the [criminal] statute [of limitations] has run it is a mere regulation of the remedy

... subject to legislative control" [internal quotation marks omitted]). In such cases, a defendant also has no legitimate expectancy interest in the application of that limitation period: defendants do not engage in criminal conduct with an eye on the then applicable statute of limitations, and, even if they did, society, for obvious reasons, is not prepared to recognize any such reliance as reasonable.[46]

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46 We note that a significant number of courts have concluded that applying an amendment to a statute of limitations enlarging the unexpired period of time within which a prosecution may be brought is not a retroactive application of the extended period at all. *E.g.*, *State v. Schultzen*, 522 N.W.2d 833 (Iowa 1994) ("applying the extended statute of limitations was not retroactive because the statute barred only prospective prosecutions ... [and][b]ecause the prosecution of the defendant was not barred as of the time the amendment became effective" [citation omitted]); *State v. Hirsch*, 245 Neb. 31, 43, 511 N.W.2d 69 (1994) ("because the extension of a statute of limitations to offenses not barred by a previous period of limitations does not affect a defendant's existing rights or defenses, the application of the extended statute to existing causes of action is not a retroactive law"); *State v. Dufort*, 111 Or.App. 515, 519, 827 P.2d 192 (1992) ("the amended Statute of Limitations is not retroactive legislation and ... it applies to incidents ... that had not yet been barred under the previous statute"); *Commonwealth v. Johnson*, 520 Pa. 165, 170, 553 A.2d 897 (1989) ("There is nothing retroactive about the application of an extension of a statute of limitations, so long as the original statutory period has not yet expired.... Only whe[n] a vested right or contractual obligation is involved is a statute applied retroactively when it is applied to a condition existing on its effective date which resulted from events [that] occurred prior to that date." [Citations omitted; internal quotation marks omitted.]). This view--under which P.A. 76-35, § 1, *would apply* to the conduct at issue in the present case because the application of the amendment would be considered prospective rather than retrospective-- arguably finds support in *Landgraf v. USI Film Products*,

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511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), in which the United States Supreme Court made the following general observations about statutory retroactivity: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment ... or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have 'sound ... instinct[s],' ... and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." (Citations omitted.) *Id.*, at 269- 70, 114 S.Ct. 1483. As this court recently has observed, however, in criminal cases, we generally look to the date of the offense in determining whether a change in the law is considered retroactive; *In re Daniel H.*, *supra*, 237 Conn. at 377, 678 A.2d 462; *see also State v. Crowell*, *supra*, 228 Conn. at 401, 636 A.2d 804 (rejecting argument of state that applying amendatory extension of statute of limitations to conduct occurring before expiration of preamendment limitation period does not constitute retroactive application of amendment); and, for purposes of this appeal, we adhere to that general rule. It is important to note, though, that regardless of whether the application of an amendment to a criminal statute of limitation is characterized as prospective because the original limitation period had not expired prior to the amendment's enactment, or, under the same factual scenario, that amendment is deemed to apply retroactively because it is procedural or remedial in nature, the result is precisely the same: the limitation period as amended, rather than the original limitation period, is the applicable limitation period.

The canon of statutory construction that procedural or remedial statutes are to be applied retroactively in the absence of a contrary legislative intent is grounded in the presumption that the legislature intended that result because such retroactive application will most broadly and comprehensively effectuate the legislative policy embodied in the enactment without upsetting any settled rights or reliance interests. Labeling a statute as substantive or procedural, however, will not always resolve the fundamental issue of legislative intent.[47] Thus, we have recognized that "[t]he test of whether a statute is to apply retroactively, absent an express legislative intent, is not a purely mechanical one and even if it is a procedural statute, which ordinarily will be applied retroactively without a legislative imperative to the contrary, it will not be applied retroactively if considerations of good

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[47] Indeed, as the Washington Supreme Court has stated, "[a] review of the multitude of cases decided by many courts on [the] subject [of whether an amendment extending a criminal statute of limitation applies to offenses not already time barred when the amendment was enacted] suggests that the labeling of statutes of limitation and changes thereto as 'procedural' or 'substantive', 'prospective' or 'retrospective' or 'retroactive', and as subject to 'strict' or 'liberal' interpretation, and then letting the consequences flow according to the label affixed, tends to obscure rather than clarify the law. We deem it helpful to consider the issue in more fundamental terms of precisely what statutes of limitation in criminal cases are, and how they function." *State v. Hodgson*, *supra*, 108 Wash.2d at 667, 740 P.2d 848. We fully agree with the essential thrust of this statement. It bears reiteration that we use the procedural-substantive distinction, like other canons of statutory construction, merely as a means to attain the fundamental goal of ascertaining the presumed intent of the legislature. Indeed, it is only after consideration of "what statutes of limitations in criminal cases are, and how they function"; *id.*; that we, like the Washington Supreme Court in *Hodgson*, have reached the conclusion that such statutes are presumptively retroactive.

sense and justice dictate that it not be so applied." (Internal quotation marks omitted.) *State v. Lizotte*, 200 Conn. 734, 741, 517 A.2d 610 (1986); *see also In re Daniel H.*, *supra*, 237 Conn. at 372-73, 678 A.2d 462 ("[A]lthough we have presumed that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary ... a statute which, in form, provides but a change in remedy but actually brings about changes in substantive rights is not subject to retroactive application.... The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." [Internal quotation marks omitted.]).

Considerations of good sense and justice dictate that a court give retroactive effect to a criminal statute of limitations, absent an indication of a contrary legislative intent, when, as in the present case, that retroactive application does not revive a prosecution already time barred by a previous limitation period. As we noted previously, statutes of limitation "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice"; *United States v. Marion*, *supra*, 404 U.S. at 322, 92 S.Ct. 455; and as such, they reflect the legislature's considered judgment as to the "difficult balance between the public demand for justice and the [interest] of the individual to be free from the continual threat of prosecution for past misconduct." *State v. Ellis*, *supra*, 197 Conn. at 458 n.18, 497 A.2d 974. When the legislature implements that policy decision by modifying, through amendment, a preexisting criminal limitation period, we can conceive of no logical reason why the legislature would not have intended for that new limitation period to apply to *all* offenses that were not previously time barred under the original provision. Put differently, it is unreasonable to presume that the legislature would have intended that the exact same crimes shall be subject to different limitation periods merely because of the fortuity that one de-

fendant committed the crime the day *before* the enactment of the amendment to the limitation period while another defendant committed the identical crime the day *after* the enactment of that amendment.

Furthermore, as we observed in *Paradise*, the language of P.A. 76-35, § 1, sheds no light on whether the legislature intended for that amendment to have retroactive effect. *State v. Paradise*, *supra*, 189 Conn. at 353, 456 A.2d 305. In *Paradise*, however, we limited our retroactivity analysis to the language of the amendment; *see id.*, at 353, 456 A.2d 305; and did not consider the amendment's legislative history. To the extent that the legislative history may be deemed to have a bearing on that issue, it is scant. As we noted in *State v. Golino*, *supra*, 201 Conn. at 445, 518 A.2d 57, and *State v. Ellis*, *supra*, 197 Conn. at 460, 497 A.2d 974, however, Senator David H. Neiditz, the sponsor of the amendment, indicated that it was intended to clarify existing law. *See* 19 S. Proc., Pt. 1, 1976 Sess., p. 341. It is well established that legislation deemed to be clarifying generally is accorded retroactive effect. *E.g.*, *Andersen Consulting, LLP v. Gavin*, 255 Conn. 498, 517, 767 A.2d 692 (2001); *Toise v. Rowe*, 243 Conn. 623, 628, 707 A.2d 25 (1998). Although not conclusive, Senator Neiditz' comment supports our determination that P.A. 76-35, § 1, has retroactive applicability.[48]

Moreover, our conclusion that an amendment to a criminal statute of limitations is presumptively applicable to crimes not previously barred by the original limitation period is supported by the considerable weight of authority. *See*,

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48 We note that, in both *Ellis* and *Golino*, we underscored the significance of Senator Neiditz' comment that P.A. 76-35, § 1, was intended to clarify existing law. *See State v. Golino*, *supra*, 201 Conn. at 445, 518 A.2d 57; *State v. Ellis*, *supra*, 197 Conn. at 460, 497 A.2d 974.

e.g., *People v. Sample*, 161 Cal.App. 3d 1053, 1058, 208 Cal.Rptr. 318 (1984); *State v. O'Neill*, 118 Idaho 244, 248, 796 P.2d 121 (1990); *People v. Isaacs*, *supra*, 37 Ill.2d at 229, 226 N.E.2d 38; *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994); *State v. Nunn*, 244 Kan. 207, 217, 768 P.2d 268 (1989); *Commonwealth v. Bargeron*, 402 Mass. 589, 593-94, 524 N.E.2d 829 (1988); *People v. Russo*, 439 Mich. 584, 594-97, 487 N.W.2d 698 (1992); *Christmas v. State*, 700 So.2d 262, 266-67 (Miss. 1997); *State v. Hirsch*, 245 Neb. 31, 43-44, 511 N.W.2d 69 (1994); *State v. Hamel*, 138 N.H. 392, 395-96, 643 A.2d 953 (1994); *State v. Nagle*, 226 N.J.Super. 513, 516, 545 A.2d 182 (1988); *People ex rel. Reibman v. Warden of County Jail*, 242 A.D. 282, 284-85, 275 N.Y.S. 59 (1934); *People v. Pfitzmayer*, 72 Misc.2d 739, 741-42, 340 N.Y.S.2d 85 (1972); *State v. Buchholz*, 678 N.W.2d 144, 149 (N.D. 2004); *State v. Dufort*, 111 Or.App. 515, 519, 827 P.2d 192 (1992); *Commonwealth v. Johnson*, 520 Pa. 165, 170, 553 A.2d 897 (1989); *State v. Wolfe*, 61 S.D. 195, 199, 247 N.W. 407 (1933); *Rose v. State*, 716 S.W.2d 162, 165 (Tex.App. 1986, pet.ref'd), *cert. denied*, 486 U.S. 1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988); *State v. Lusk*, 37 P.3d 1103, 1109-10 (Utah 2001); *State v. Petrucelli*, *supra*, 156 Vt. at 383-84, 592 A.2d 365; *State v. Hodgson*, *supra*, 108 Wash.2d at 665-68, 740 P.2d 848; *see also* 21 Am.Jur.2d 349-50, Criminal Law § 294 (1998) ("Whe[n] a statute extends the period of limitation, the extension applies to offenses not barred at the time of the passage of the act, so that a prosecution may be commenced at any time within the newly established period. Such a statute, however, cannot operate to revive offenses that were barred at the time of its enactment, since that would make the statute ex post facto."). Although several courts have concluded otherwise; *see*, *e.g.*, *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975); *Stoner v. State*, 418 So.2d 171, 178 (Ala. Crim. App.), *cert. denied*, 418 So.2d 184 (Ala. 1982), *cert. denied*, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978

(1983); *Martin v. Superior Court*, 135 Ariz. 99, 100, 659 P.2d 652 (1983); *State ex rel. Manucy v. Wadsworth*, 293 So.2d 345, 347 (Fla. 1974); *State v. Merolla*, 100 Nev. 461, 464, 686 P.2d 244 (1984); the courts in those cases relied solely on the faulty premise that the result was dictated by the canon of strict construction. Because those cases, like *Paradise*, are founded on the same rote and erroneous application of that interpretative principle--we have not found one such case in which the court engaged in any meaningful analysis of the issue--they suffer from the same logical infirmity as *Paradise*.

Our conclusion today also resolves a tension between our mode of analysis in *Paradise* and the approach to the construction of statutes in the criminal realm that we have employed more recently in cases such as *In re Michael S.*, 258 Conn. 621, 784 A.2d 317 (2001), *State v. Parra*, *supra*, 251 Conn. 617, 741 A.2d 902, and *In re Daniel H.*, *supra*, 237 Conn. 364, 678 A.2d 462. In each of those latter cases, we expressly recognized that the focus of our inquiry was the presumed intent of the legislature, and we thereafter proceeded to identify various relevant interpretative aids, *including* the canon of construction that procedural statutes carry a presumption of retroactivity, as a means to that fundamental end. *See, e.g.*, *In re Michael S.*, *supra*, at 627-29, 784 A.2d 317; *In re Daniel H.*, *supra*, at 372-73, 376, 678 A.2d 462. In *Paradise*, by contrast, our statutory interpretation was guided solely by the rule of strict construction, an approach that, as we have explained, was unduly cramped and formalistic.

Moreover, in *Parra*, we acknowledged that the rule that we had announced in *Paradise* does not extend to those areas of the criminal process that bear only a remote connection to the criminal conduct for which the defendant was charged. *State v. Parra*, *supra*, 251 Conn. at 626, 741 A.2d 902. By way of illustration, we noted that the amendatory provision at

issue in *Parra* did "not change the elements of the crime with which the defendant was charged, alter the elements of his defense to that crime or make more burdensome the punishment for that crime, after its commission."[49] *Id.* The same can be said of criminal statutes of limitation because they also do not purport to define or regulate criminal conduct in any way. We therefore see no reason why a criminal limitation period should not be included among those provisions that, although a part of our system of criminal laws, nevertheless carry a presumption of retroactivity.

In reaching this conclusion, we are mindful, of course, of the doctrine of stare decisis, which "counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it.... Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes

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[49] We note that these considerations are very similar to the factors to be evaluated in determining whether a retroactive law violates the ex post facto clause of the United States constitution. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 52, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (concluding that Texas statute did not violate ex post facto clause because it did "not punish as a crime an act previously committed, which was innocent when done, nor make more burdensome the punishment for a crime, after its commission, nor deprive one charged with crime of any defense available according to law at the time the act was committed"). The similarity between the two inquiries is not surprising: both involve a determination of whether the retroactive application of a statute will upset vested rights or reasonable reliance interests such that applying the statute retroactively would be fundamentally unfair. *See Stogner v. California, supra*, 539 U.S. at 621, 627, 632, 123 S.Ct. 2446 (fairness is important factor in determination of whether retroactive application of criminal statute violates ex post facto clause).

judicial efficiency.... It is the most important application of a theory of decisionmaking consistency in our legal culture and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative value." (Internal quotation marks omitted.) *St. George v. Gordon*, 264 Conn. 538, 553-54 n.16, 825 A.2d 90 (2003). Stare decisis, however, "is not an end in itself.... Experience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better.... The flexibility and capacity of the common law is its genius for growth and adaptation." (Citation omitted; internal quotation marks omitted.) *State v. Brocuglio*, 264 Conn. 778, 793, 826 A.2d 145 (2003). Indeed, "[i]f law is to have current relevance, courts must have and exert the capacity to change a rule of law when reason so requires." (Internal quotation marks omitted.) *State v. Vakilzaden*, 251 Conn. 656, 663, 742 A.2d 767 (1999). "[Thus] [t]his court ... has recognized many times that there are exceptions to the rule of stare decisis." (Internal quotation marks omitted.) *Id.*

We also acknowledge that, "[i]n assessing the force of stare decisis, our case law has emphasized that we should be especially cautious about overturning a case that concerns statutory construction.... Despite this reluctance, however, we have, on occasion, overruled cases that have involved the interpretation of a statute.... Thus the fact that there is preexisting case law on point is not, in and of itself, determinative of the issue presently before us." (Citations omitted; internal quotation marks omitted.) *Waterbury v. Washington*, 260 Conn. 506, 538, 800 A.2d 1102 (2002). It is important to note, moreover, that the holding of *Paradise* was considerably more far-reaching than our conclusion therein that P.A. 76-35 has prospective effect only: we also held, in the exercise of our common-law authority, that *all* criminal statutes of limitation are to be applied prospectively unless the lan-

guage of the statute clearly expresses a contrary intent.[50] The breadth of our holding in *Paradise*-- involving, as it does, a common-law rule of statutory construction-- necessarily tempers our traditional reluctance to upset the settled interpretation of a particular statute.[51] Because "a

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[50] It might be argued that, having announced the rule in *Paradise* that criminal statutes of limitation will not be applied retroactively in the absence of clear statutory language to the contrary, the legislature is aware of that rule and can tailor its legislative enactments accordingly. *See State v. Crowell*, *supra*, 228 Conn. at 401, 636 A.2d 804. We reject that contention because we think it is unwise to continue to require the legislature to conduct itself in accordance with a rule that is, itself, unwise and unsound.

[51] It is true that, following our opinion in *Paradise*, the legislature did not further amend § 54-193 to express its intent that § 54-193 should be accorded retroactive effect. As we previously has observed, although legislative inaction following our interpretation of a statute does not necessarily constitute legislative affirmation of that interpretation, such inaction may be understood as a validation of our construction. *See, e.g., Rivera v. Commissioner of Correction*, 254 Conn. 214, 252, 756 A.2d 1264 (2000). Under the present circumstances, we do not believe that legislative inaction provides a reason to refrain from overruling *Paradise*. We issued our opinion in *Paradise* in March, 1983, approximately seven years after the April 6, 1976, effective date of P.A. 76-35, § 1. Thus, any uncharged murder or class A felony that, under our opinion in *Paradise*, was subject to the five year limitation period of the pre-1976 amendment version of § 54-193, necessarily had been committed no less than seven years prior to the issuance of our opinion in *Paradise*. Consequently, by the time we issued our opinion in *Paradise*, the five year limitation period that we had deemed applicable to those crimes in Paradise already would have expired with respect to those crimes.

Although the United States Supreme Court first held in 2003 that the ex post facto clause of the United States constitution prohibits a state

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judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason ... [we are confident that] [r]espect for the process of adjudication [will] be enhanced, not diminished, by our ruling [in the present case]." *Moragne v. States Marine Lines*, 398 U.S. 375, 405, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

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from extending the limitation period for an offense committed after the expiration of the original limitation period; *see Stogner v. California*, *supra*, 539 U.S. at 632, 123 S.Ct. 2446; it was universally recognized at the time of our decision in *Paradise* that an amendment that operated to revive an expired limitation period with respect to a particular offense violated the ex post facto clause. *See, e.g., id.*, at 617-19, 123 S.Ct. 2446 (explaining unanimous agreement of courts and commentators that ex post facto clause bars amendment to limitation period that revives previously expired limitation period). Indeed, in *Paradise*, we expressly declined to decide whether the retroactive application of a criminal statute of limitation violated the ex post facto clause; *State v. Paradise*, *supra*, 189 Conn. at 350, 456 A.2d 305; even though, as in the present case, the extended limitation period became effective prior to the expiration of the previously applicable limitation period. *See id.*, at 348, 456 A.2d 305; *see also id.*, at 350 n.3, 456 A.2d 305 ("we reserve decision on the question of whether the legislature could have extended the statute of limitations and given it retrospective effect as those offenses on which the limitation period had not already expired"). Because it was clear in 1983 that the ex post facto clause prohibited any amendment to § 54-193 that purported to revive a previously time barred prosecution, we must presume that the legislature elected to refrain from amending the pre-1976 amendment version of § 54-193 for *that* reason, and not *necessarily* because it agreed with our conclusion in *Paradise*.

To summarize, the rationale of *Paradise* does not withstand careful analysis. Although we will not lightly reverse long-standing precedent, we are unwilling to compound the error that we made in *Paradise* by approving it again today. Our responsibility to reconsider prior decisions of this court when a party has so requested, together with our firm conviction that *Paradise* was wrongly decided, prevent us from doing so. We conclude, therefore, that an amendment to a criminal statute of limitations applies to a crime committed prior to the enactment of the amendment, in the absence of a clear expression of legislative intent to the contrary, as long as the preamendment limitation period had not yet expired when the amendment became effective. Because there is no indication that the legislature intended that P.A. 76-35, § 1, was to have prospective effect only, that amendment, contrary to our conclusion in *Paradise*, applies retroactively to crimes that were committed before its effective date but for which the preamendment limitation period had not yet expired. Consequently, P.A. 76-35, § 1, applies to the October, 1975 murder of the victim. Because the defendant had no vested statute of limitations defense prior to the enactment of P.A. 76- 35, § 1, and because that provision excludes all class A felonies, including murder, from its five year limitation period, the state's prosecution of the defendant for the victim's murder was not time barred.

III

The defendant next claims that the state improperly withheld certain exculpatory evidence, namely, a composite drawing of a man observed walking near the crime scene on the evening of October 30, 1975, and two reports prepared by a state investigator profiling Kenneth Littleton and Thomas Skakel as potential suspects. The defendant further claims that the state's failure to disclose that evidence deprived him of his right to a fair trial in violation of *Brady v. Maryland*, *supra*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and its

progeny. We reject each of these claims, which we address in turn.

A

The following facts and procedural history are necessary to our resolution of the defendant's claim that the state violated his rights under *Brady* by failing to disclose the composite drawing. On May 21, 2001, the defendant filed a pretrial motion for disclosure and production, requesting, inter alia, that the state disclose any "[i]nformation and/or material which is exculpatory in nature," including "[p]hotographs, composite sketches or other media replications that depict the likeness or physical attributes of [any] alleged perpetrator of this crime."[52] The state, which had indicated that it was adopting an open file policy for purposes of the case, did not object to this particular request, and, on August 15, 2001, the trial court issued an order requiring that the state comply with this and all other discovery requests to which the state had not objected. In accordance with its open file policy and the court's order pertaining to discovery, the state provided the defendant with numerous reports and documents relating to the investigation of the case.

One such report states that, on October 31, 1975, investigating officers searching the general vicinity of the murder scene were approached by special officer Charles Morganti, Jr. Morganti informed the officers that he had been on special duty patrol of the Belle Haven neighborhood the previous evening when, at about 10 p.m., he observed a white male walking in a northerly direction on Field Point Road. Mor-

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[52] The defendant's discovery request was twenty pages in length. The defendant previously had filed a similar request, on June 12, 2000, at which time the case still was pending in the Superior Court for Juvenile Matters.

ganti then observed the man turn onto Walsh Lane. Morganti approached the individual and asked him where he was going. The individual replied that he lived on Walsh Lane and that he was going home. Morganti further reported to the officers that he observed the man again, a few minutes later, walking northbound on Otter Rock Drive, just north of the Walsh Lane intersection.[53]

A second such report reflects the fact that Morganti was interviewed by the police again the following day. That report states that Morganti had agreed to "appear at the [d]etective [b]ureau for the purpose of putting [together] a composite picture of the subject that he had observed on Field Point [Road] near Walsh [Lane] on Thursday, [October 30, 1975]."

Another police report indicates that, on November 5, 1975, the police interviewed Carl Wold, a resident of Walsh Lane in the Belle Haven neighborhood. Wold informed the police that, at about 7:20 p.m. on October 30, 1975, he went out for his nightly walk. According to Wold, he walked east on Walsh Lane, turned right onto Field Point Road and then turned south toward Field Point Circle.[54] He recalled having

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[53] Morganti provided the following description of the individual he had observed walking that evening: "White, male, [six feet] tall, 200 [pounds], late [twenties] to early [thirties], dark rimmed glasses, fatigue jacket, tan [slacks], blonde hair."

[54] Wold gave the interviewing officers the following description of his attire on the evening in question: "Brown (olive) field jacket, yellow corduroy shirt, tan slacks top-sider shoes ...." The report also includes the following physical description of Wold: "[Six feet, one inch], 210 [pounds], dark brown, straight hair, medium length and wears silver rimmed glasses." The report further describes Wold as a twenty-three year old white male.

a short conversation with an officer at the Field Point police booth and, later, on his way home, being stopped by a special police officer on Field Point Road, just south of the Walsh Lane intersection. This officer had inquired of Wold where he was headed, and Wold responded that he was returning to his home on Walsh Lane. Wold further stated that he returned home at about 8 p.m. and remained there for rest of the evening.[55] Wold denied walking on Otter Rock Drive that evening.[56]

Approximately nineteen years later, on October 8, 1994, Inspector Frank Garr of the office of the state's attorney interviewed Morganti again.[57] The written report of that interview reflects that Morganti informed Garr that James F. Murphy, a private investigator who had been retained by the Skakel family, had contacted him and questioned him about the "incident involving the individual [that Morganti had] stopped on Field Point Road, in Belle Haven" on the evening of October 30, 1975. Morganti also told Garr that he saw

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[55] Wold's father, with whom Wold resided, corroborated Wold's account of his activities that evening. In addition, a second special duty officer, John Duffy, was on duty at the Field Point police booth sometime between 6 p.m. and 6:30 p.m. on the evening of October 30, 1975, when he observed Wold, who was known to Duffy as a resident of Walsh Lane, taking his daily walk on Field Point Road. Duffy also recalled having a brief conversation with Wold, who told Duffy that he was heading home.

[56] The police contacted Morganti again on November 5, 1975. At that time, Morganti stated that he was certain that the man to whom he had spoken on Field Point Road on the evening of October 30, 1975, was the same individual he later observed walking on Otter Rock Drive.

[57] The copy of the report provided to this court does not indicate the identity of the investigator who authored the report. Both the state and the defendant have indicated, however, that Garr wrote the report.

that person walking north on Field Point Road at approximately 8 p.m. that evening. Morganti further stated that he was replacing a fallen road stanchion just north of the residence of Cynthia Bjork on Otter Rock Drive sometime between 9:30 and 10 p.m. that evening when, from a distance of approximately one hundred yards, he observed the same individual "walking in a northerly direction through the front yard of a residence on Otter Rock Drive, across from the Skakel residence."[58] The report also states that, at the time of the original police investigation of the victim's murder, "Morganti reported the entire episode to the [police] investigators and assisted in the making of a composite sketch of the individual. A complete investigation into the matter was instigated, and it was determined that the individual was ... Carl Wold." The report further states that Garr, who was accompanied by Murphy and, apparently, Morganti, then proceeded to the location on Otter Rock Drive where Morganti recalled having observed the individual for a second time on the evening of October 30, 1975.[59]

Following the jury verdict and shortly before sentencing, the defendant, on August 26, 2002, filed an amended motion for a new trial and request for an evidentiary hearing,[60]

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58 Another police report documents an interview with Bjork, who lived on Otter Rock Drive in the Belle Haven neighborhood at the time of the murder. Bjork told police that her husband had seen Morganti outside her house replacing a fallen road stanchion at about 9:40 p.m. on October 30, 1975.

59 According to the report, Garr confirmed that this individual was approximately 100 yards from Morganti when Morganti saw the individual for the second time that evening.

60 Practice Book § 42-53 authorizes the filing of a motion for a new trial. Practice Book § 42-54 provides that, "[u]nless otherwise permitted

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claiming, inter alia, that the state had violated his rights under *Brady* by failing to make a timely disclosure of a composite drawing of the individual who Morganti had observed on the evening of October 30, 1975.[61] In support of his claim, the defendant asserted that the state had not provided him with a copy of that drawing until August 1, 2002,[62] and that the drawing was significant because it tended to buttress his third party culpability defense. In particular, the defendant asserted that the composite drawing bore a strong resemblance to Littleton, a former suspect in the victim's murder whom the defendant, in support of his third party culpability defense, had identified as a likely perpetrator. The defendant further maintained that, although the state had concluded that Wold was the person who Morganti had observed near the crime scene at or near the time of the victim's murder, discrepancies in Wold's and Morganti's statements as to when Morganti saw Wold cast doubt on the state's conclusion.

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by the judicial authority in the interests of justice, a motion for a new trial shall be made within five days after a verdict or finding of guilty or within any further time the judicial authority allows during the five-day period."

61 The defendant's original motion for a new trial was filed on June 12, 2002.

62 In his brief to this court, the defendant represents that "[a]fter [he] was convicted, but prior to sentencing, [his] new counsel inquired about the existence of the sketch ...." The record otherwise is silent as to when the defendant's new counsel, who filed an appearance on behalf of the defendant after the jury verdict, requested the drawing. The record also is devoid of any indication as to what specifically had prompted the defendant's new counsel to make such a request.

The trial court heard argument on the defendant's motion on August 28, 2002, the same day that the sentencing hearing commenced. At the hearing on the defendant's motion, defense counsel represented that, despite the state's open file policy in the case, the composite drawing was not among the materials that the state had made available to the defendant's trial counsel prior to trial.[63] Defense counsel further represented that the state had provided the defendant's trial counsel with 1806 pages of discovery in connection with the case.[64]

During the argument, the trial court asked the defendant's trial counsel whether he had received, prior to trial, the 1975 investigative report that refers to Morganti's willingness to participate in the creation of a composite drawing, and the 1994 investigative report that refers to a completed composite drawing. The defendant's trial counsel answered in the affirmative with respect to both reports. At the conclusion of the argument, the court denied the defendant's motion for a new trial and for an evidentiary hearing on that motion.[65] On appeal, the defendant renews his claim that he

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63 The portion of the hearing during which the parties addressed the issue of the composite drawing was argued on behalf of the defendant by attorney Hubert Santos, whom the defendant had retained after the jury had returned its verdict. The defendant also was represented at the hearing by his trial counsel, Michael Sherman.

64 The state has not challenged the defendant's representation that his trial counsel had received 1806 pages of materials from the state during the course of pretrial discovery.

65 The trial court rejected the defendant's claim regarding the composite drawing both on the ground that the claim was untimely and because it lacked merit. In view of our conclusion that the trial court properly rejected the defendant's claim on its merits, we need not address the issue

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was deprived of a fair trial by virtue of the state's failure to produce the composite drawing prior to trial.[66]

Our analysis of the defendant's claim begins with the pertinent standard, set forth in *Brady* and its progeny, by which we determine whether the state's failure to disclose evidence has violated a defendant's right to a fair trial. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, *supra*, 373 U.S. at 87, 83 S.Ct. 1194. In *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the United States Supreme Court identified the three essential components of a *Brady* claim, all of which must be established to warrant a new trial: "The evidence at issue

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of the timeliness of the defendant's *Brady* claim insofar as it relates to the composite drawing.

66 We note, preliminarily, the standard of review applicable to both of the defendant's claims. "Appellate review of a trial court's decision granting or denying a motion for a new trial must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided.... Thus, [a] motion for a new trial is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds.... In our review of the denial of a motion for [a new trial], we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State v. McIntyre*, 250 Conn. 526, 533, 737 A.2d 392 (1999).

must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Id.*, at 281-82, 119 S.Ct. 1936; *see also State v. Wilcox*, 254 Conn. 441, 452, 758 A.2d 824 (2000) ("[t]o establish a *Brady* violation, the defendant must show that [1] the government suppressed evidence, [2] the suppressed evidence was favorable to the defendant, and [3] it was material [either to guilt or to punishment]" [internal quotation marks omitted]). Under the last *Brady* prong, the prejudice that the defendant suffered as a result of the impropriety must have been material to the case, such that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). The trial court concluded that the defendant had failed to demonstrate either that the composite drawing was suppressed or that it was material. For the reasons that follow, we conclude that the defendant cannot show that the state suppressed the composite drawing for purposes of *Brady*. Consequently, we need not, and, therefore, do not, reach his claim concerning the materiality prong of the *Brady* test.[67]

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[67] We note that the trial court rejected the defendant's materiality claim on the ground that the composite drawing would not have been admissible at trial because Morganti did not testify even though he was an available witness and could have described the individual he saw on the evening of October 30, 1975. We agree with the defendant that, contrary to the conclusion of the trial court, the fact that Morganti did not testify at trial has no bearing either on the admissibility or materiality of the drawing; the defendant presumably would have placed the drawing into evidence, through Morganti or otherwise, if the defendant had been provided with a copy of the drawing in advance of trial. In any event, the trial

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For purposes of this appeal, we presume that the state did not provide the defendant with a copy of the drawing prior to August 21, 2002.[68] To the extent that the state failed to do so, that failure constituted a violation of the open file policy to which the state had announced it would adhere in the case.[69] That fact alone, however, is not dispositive of the

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court never made any findings on the materiality issue, which necessarily involves a fact specific inquiry into the relative import of any exculpatory evidence that has been suppressed in view of the trial evidence as a whole. *See, e.g., United States v. Gil*, 297 F.3d 93, 103 (2d Cir.2002) ("We assess materiality or prejudice in light of the trial evidence. Where the evidence against the defendant is ample or overwhelming, the withheld *Brady* material is less likely to be material than if the evidence of guilt is thin."); *see also State v. Hammond*, 221 Conn. 264, 294, 604 A.2d 793 (1992) (noting that reviewing court will give deference to finding of trial court on claim of possible *Brady* violation because of "difficulty inherent in measuring the effect of nondisclosure in the course of a lengthy trial with many witnesses and exhibits" [internal quotation marks omitted]). For that reason, and because our rejection of the defendant's challenge to the trial court's resolution of the suppression issue is dispositive of the defendant's claim concerning the composite drawing, we do not address the defendant's contention that the trial court improperly determined that the drawing was not material.

[68] We make this presumption in light of the defendant's representation that he had not been provided with a copy of the composite drawing and because the trial court, having rejected the defendant's request for a hearing on the issue, made no factual finding on this point.

[69] As we previously have stated, "although we encourage the use of open file policies and recognize that this practice may increase the efficiency and the fairness of the criminal process ... [w]e ... [nevertheless] urge parties not to consider implementation of an open file policy as satis-

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defendant's claim regarding the suppression component of *Brady* because it is well established that "evidence is not considered to have been suppressed within *the meaning of the Brady doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.*" (Emphasis added; internal quotation marks omitted.) *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995), *cert. denied*, 516 U.S. 1165, 116 S.Ct. 1056, 134 L.Ed.2d 201 (1996); accord *United States v. Zichettello*, 208 F.3d 72, 103 (2d Cir. 2000), *cert. denied sub nom. Lysaght v. United States*, 531 U.S. 1143, 121 S.Ct. 1077, 148 L.Ed.2d 954 (2001); *see also United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983). The rationale underlying this exception to the state's disclosure obligation under *Brady* is obvious: *Brady* is designed to assure that the defendant is not denied access to exculpatory evidence known or available to the state but unknown or unavailable to him. *See, e.g., United States v. LeRoy, supra*, at 619; *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973). It is not intended either to relieve the defense of its obligation diligently to seek evidence favorable to it or to permit the defense to close its eyes to information likely to lead to the discovery of such evidence. Thus, the composite drawing will not be deemed to have been suppressed by the state, notwithstanding the open file policy in effect in this case, if the defendant or the defendant's trial

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faction of the defendant's discovery requests or the state's constitutional obligation to disclose exculpatory materials." (Citation omitted; internal quotation marks omitted.) *State v. Wilcox, supra*, 254 Conn. at 453 n. 19, 758 A.2d 824.

counsel reasonably was on notice of the drawing's existence but nevertheless failed to take appropriate steps to obtain it. *See, e.g., United States v. LeRoy, supra*, at 618-19 (defendant cannot prevail under *Brady* if he was on notice of essential facts that would have enabled him to take advantage of exculpatory evidence but he failed to do so).

We agree with the finding of the trial court that, in the present case, the defendant or his trial counsel clearly was on notice of the existence of the composite drawing. First, the 1975 investigative report refers to the fact that Morganti had agreed to return to police headquarters to assist in the preparation of a composite drawing of the person he had observed in the vicinity of the crime scene on the evening of October 30, 1975. Second, the 1994 investigative report states that Morganti had "assisted in the making of a composite sketch of [that] individual." Thus, as the defendant had noted in the memorandum that he filed with the trial court in support of his amended motion for a new trial, "[t]he circumstances surrounding the preparation of the sketch are provided in the police reports prepared during the investigation." Finally, the state provided the defendant and his trial counsel with those reports during discovery, and the defendant's trial counsel acknowledged that he was aware of them. The defendant or his trial counsel, therefore, had actual notice of the existence of the composite drawing and, consequently, the defendant was obliged to supplement his general *Brady* request with a specific request for that particular piece of evidence.[70]

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[70] Indeed, on April 16, 2002, after the commencement of jury selection but before the evidentiary portion of the trial had commenced, the defendant did file a "supplemental discovery motion for exculpatory evidence" in which he made several specific requests for information relating to Littleton, the individual who the defendant contends strongly resembles the person depicted in the composite drawing, including the results of any

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Moreover, the defendant was well aware of Morganti's potential significance as a witness long before trial. Indeed, Murphy, the defendant's investigator, interviewed Morganti in 1994 and, together with Garr and Morganti, went to the location where Morganti had observed the individual who the defendant contends may have been Littleton. It is well known, of course, that police investigators routinely use composite drawings to aid in identifying potential suspects, and the defendant's investigator, who had unfettered access to Morganti, had every opportunity to ask Morganti if he had assisted the police in creating one.[71]

The defendant asserts that it is unreasonable to conclude that the 1975 and 1994 investigative reports were sufficient notice of the existence of the composite drawing because those reports were "buried" among 1806 pages of other documents produced by the state. This argument founders on the acknowledgment of the defendant's own trial counsel that he was aware of the two reports. Moreover, the defendant makes no claim that the reports were disclosed late or that he

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scientific or forensic tests tending to link Littleton to the victim's murder. The defendant, however, never filed a supplemental discovery request for the composite drawing.

[71] Because the defendant or his trial counsel had actual notice of the existence of the composite drawing, we need not decide whether the defendant's ready access to Morganti would have been sufficient, without more, to have relieved the state of its burden of production under *Brady*. *See, e.g., United States v. LeRoy, supra,* 687 F.2d at 619 (government's failure to disclose witness' allegedly exculpatory grand jury testimony does not constitute suppression of that testimony for purposes of *Brady* when defendant knew of witness and fact that witness might have testified).

or his trial counsel otherwise did not have ample time, opportunity or resources to consider them.[72]

The defendant also contends that, notwithstanding the existence of the 1975 and 1994 reports, he did not have adequate notice of the exculpatory nature of the composite drawing. This claim is predicated on the defendant's dual asser-

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72 We note that the trial court issued its discovery order on August 15, 2001, and that the state filed a notice with the court on September 25, 2001, that it had complied with that order. In the absence of any claim or indication to the contrary, we presume that the 1975 and 1994 investigative reports that refer to the composite drawing were included in the materials turned over to the defendant and his trial counsel in accordance with the state's notice of compliance. Because the evidentiary portion of the trial did not commence until May 7, 2002, the defendant and his trial counsel had more than sufficient opportunity to review those reports prior to trial.

The defendant's reliance on *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002), is therefore misplaced. In *Gil*, the government did not disclose a certain exculpatory memorandum until one business day before trial even though the defendant, John Gil, had made numerous specific requests for such evidence. *Id.*, at 105-106. In addition, because the memorandum was located "among five reams" of other documents and not clearly indexed, it was "not easily identifiable as a document of significance ...." *Id.*, at 106. Under all of the circumstances of the government's belated disclosure, the Second Circuit Court of Appeals concluded that the memorandum had been suppressed because, "[a]lthough the ... memo[randum] was produced before trial, the defense was not in a position to read it, identify its usefulness, and use it." *Id.* In the present case, the defendant or his trial counsel had notice of the composite drawing well in advance of trial but failed to request it until after the trial had concluded.

tion that: (1) he could not have known the exculpatory value of the drawing until he saw it and compared it to a photograph of Littleton; and (2) the 1994 report indicated that, in the view of the police, the person depicted in the drawing was Wold, who was not a suspect in the victim's murder. Neither of these assertions is reason to excuse the defendant's failure to have requested the drawing. The defendant had a duty to request the composite drawing because it was *potentially* exculpatory, irrespective of what the state may have thought about the drawing's import. In other words, the defendant could not wait until the completion of the trial to ascertain the value of the drawing to his defense; rather, he was obligated to obtain that evidence and to evaluate its utility prior to trial.

The defendant further argues that he cannot be faulted for failing to make a specific request for the composite drawing, despite the references to the drawing in the reports he did receive, because he was entitled to conclude that, in light of the state's open file policy, the state would have produced the drawing if it existed. In support of this contention, the defendant cites a number of cases that have articulated the general principle that a defendant normally may rely on the government's representation that it has made full disclosure of information to which the defendant is entitled under *Brady*. *E.g.*, *Strickler v. Greene*, *supra*, 527 U.S. at 284, 119 S.Ct. 1936; *see also United States v. Payne*, *supra*, 63 F.3d at 1207-1208. In each of those cases, however, the court also indicated that defense counsel had no reason to know that the government's disclosure was less than complete. *See Strickler v. Greene*, *supra*, at 284, 119 S.Ct. 1936; *United States v. Payne*, *supra*, at 1208. In the present case, by contrast, the defendant or his trial counsel had actual notice of the existence of the allegedly exculpatory evidence, yet failed to notify the state that it had not provided them with a copy of it. The defendant has cited no case, and we are aware of none, in which a defendant had notice of the existence of poten-

tially exculpatory evidence but nevertheless was excused by the court from taking reasonable steps to obtain it. We, too, decline to endorse such an approach because there simply is no reason why a defendant who is aware of such evidence should not be required to seek it at a point in time when any potential constitutional infirmity arising from the state's failure to provide the evidence can be avoided without the need for a new trial.[73]

Furthermore, the defendant's contention that he reasonably believed that his responsibility to obtain *Brady* material ended with the state's announcement of an open file policy is belied by the record. In particular, long after that announcement, the defendant filed two supplemental written requests for the disclosure of exculpatory evidence under *Brady*. One such request was made during jury selection, the other shortly after the commencement of trial, and each was considerably more specific than the defendant's initial *Brady* re-

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[73] We fully acknowledge, of course, that, as the United States Supreme Court recently has observed, the decisions of that court "lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). Indeed, "[a] rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.*, at 696, 124 S.Ct. 1256. Nevertheless, when, as in the present case, a defendant is on notice of the existence of *Brady* material that the state has failed to turn over, the defendant is required to make reasonable efforts to obtain the exculpatory evidence. As we have indicated, any other rule would create a strong incentive for the defendant to await the outcome of the trial before seeking the evidence from the state.

quest.[74] It is apparent, in light of those supplemental requests, that the defendant knew of his continuing responsibility to identify and seek exculpatory material under *Brady* despite the state's open file policy. *Cf. United States v. Bagley*, 473 U.S. 667, 682-83, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) ("the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist").

We conclude, therefore, that the facts fully support the trial court's determination that the defendant failed to establish that the state suppressed the composite drawing within the meaning of *Brady*. Consequently, the defendant cannot prevail on his claim that he is entitled to a new trial by virtue of the state's failure to provide him with a copy of the composite drawing prior to trial.

B

The defendant also contends that the trial court improperly rejected his contention that the state had violated his rights under *Brady* by failing to provide him with two reports, authored by state investigators, profiling Littleton and Thomas Skakel as possible suspects. We also reject this claim.

The factual and procedural background relevant to this claim may be summarized as follows. On May 13, 2002, John F. Solomon, a former supervisory inspector with the office of the state's attorney in the judicial district of Fairfield, testified outside the presence of the jury concerning issues that were raised in a motion then pending before the

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[74] In fact, as we have indicated, one such request involved Littleton, the person who the defendant believes Morganti may have seen on the evening of October 30, 1975. *See* footnote 70 of this opinion.

court. During his testimony, Solomon referred to a copy of a report that he had prepared in connection with the investigation of the victim's murder. Solomon characterized that report, which he wrote in 1992, as a profile of Littleton summarizing why, at the time the report was written, Littleton was considered a suspect. Immediately after Solomon referred to the report, the defendant's trial counsel requested a copy, to which the court responded: "Not right now. You are talking about examining the witness." At that same proceeding, the state elicited testimony from Solomon indicating that he had prepared a similar profile of Thomas Skakel, who, at one time, also was a suspect in the victim's murder.

The defendant failed to renew his request for those reports before the conclusion of the trial, and his original motion for a new trial, which was timely filed on June 12, 2002,[75] did not refer to the two reports. The defendant did raise the issue, however, in his amended motion for a new trial, which was filed on August 26, 2002, claiming that the state had withheld the profiles of Littleton and Thomas Skakel in violation of its obligation under *Brady* to disclose exculpatory evidence. At the August 28, 2002 hearing on the defendant's amended motion for a new trial, the state asserted that the defendant's claim was time barred because it had not been raised until long after the expiration of the five day period for the filing of such motions prescribed by Practice Book § 42-54,[76] and just prior to the sentencing hearing that also was scheduled to commence on that same day. The state also maintained that the two reports were internal office

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75 The jury returned its guilty verdict on June 7, 2002. Consequently, the defendant's original motion for a new trial, which was filed five days thereafter, was timely under Practice Book § 42-54. *See* footnote 60 of this opinion.

76 See footnote 60 of this opinion.

documents and, therefore, exempt from discovery under Practice Book § 40-14[77] and the work product doctrine,[78] and that it had turned over to the defendant all of the factual information contained in the reports prior to trial, in accordance with the court's discovery order. After reviewing the two reports in camera, the trial court rejected the defendant's claim, concluding that: (1) the defendant had failed to renew his request for the reports during trial; (2) the claim otherwise was untimely because it had not been made within the five day period specified by Practice Book § 42-54, and the defendant had proffered no justification for the untimely claim;

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77 Practice Book § 40-14 provides: "Subject to Section 40-13 and except for the substance of any exculpatory material contained herein, Sections 40-11 through 40-14[do] not authorize or require disclosure or inspection of:

"(1) Reports, memoranda or other internal documents made by a prosecuting authority or by law enforcement officers in connection with the investigation or prosecution of the case;

"(2) Statements made to prosecuting authorities or law enforcement officers except as provided in Section 40-11(a)(6);

"(3) Legal research;

"(4) Records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of a prosecuting authority."

78 The work product rule protects an attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible items.... Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." (Citation omitted; internal quotation marks omitted.) *Ullmann v. State*, 230 Conn. 698, 714, 647 A.2d 324 (1994).

and (3) the reports appeared to be work product that is exempt from discovery under Practice Book § 40-14.[79] The court also noted that it had no reason to question the state's representation that the state had provided the defendant with all of the data contained in the two reports during pretrial discovery. Because the discovery documents containing those data had not been filed with the court, however, the court also observed that it had not conducted an independent review of the documents to confirm the accuracy of the state's representation. The court further indicated that, in light of that fact, its rejection of the defendant's claim did not rest on the state's contention that the defendant previously had been provided with all of the factual information contained in the two reports. Finally, at the conclusion of the hearing and after the court had denied the defendant's amended motion for a new trial, the defendant requested permission to file with the court the 1806 pages of documents that the state had turned over to him during pretrial discovery.[80] The trial court granted the defendant's request, and the documents were marked for identification only.[81]

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[79] The trial court aptly described the reports, which we also have reviewed, as "running narratives of the investigation with particular emphasis on two subjects as well as some mental impressions of the investigators."

[80] Defense counsel indicated that he wished to file those documents with the court in the interest of having a complete record for purposes of appeal.

[81] Because the defendant had not provided the state with copies of the 1806 pages of documents prior to the conclusion of the hearing, the state was not able to review those documents individually for the purpose of determining which documents contained the information that is the subject of the two reports. In its brief to this court, however, the state, having had the opportunity to review the 1806 pages of documents that the

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Although we also have no reason to doubt the state's representation that it had provided the defendant, in advance of trial, with all of the data contained in the two reports, that representation also need not be the basis for our resolution of the defendant's claim. Rather, we conclude that the trial court acted within its discretion in rejecting the defendant's claim on the ground that the defendant had failed to raise it in a timely manner under Practice Book § 42-54. Even though the defendant became aware of the two reports during trial, he did not raise a *Brady* challenge to the state's failure to provide him with the reports until two and one-half months after the five day limitation period of Practice Book § 42-54 had expired. The defendant provided the trial court with no reason for the delay, and he has not offered one on appeal. Moreover, because the defendant did not provide the court and the state with copies of the 1806 pages of discovery documents until after the hearing on the defendant's amended motion for a new trial, the court could not ascertain, prior to ruling on the defendant's claim, whether, as the state had maintained, the data contained in those discovery documents had been provided to the defendant prior to trial. We conclude, therefore, that the trial court did not abuse its discretion in rejecting the defendant's claim as time barred.

IV

The defendant next claims that the state's use of the prior testimony of Gregory Coleman violated his rights under

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defendant had filed with the trial court, has identified the specific documents that contain the factual information included in the two reports.

the confrontation clause of the sixth amendment to the United States constitution.[82] We disagree.

The following additional facts are necessary to our resolution of this claim. Coleman, a former resident of the Elan School, testified for the state at the defendant's probable cause hearing in April, 2001. Coleman testified that, one night in 1978, while Coleman and the defendant were residents at Elan, the defendant told Coleman that he had killed the victim with a golf club. Coleman, a heroin addict who acknowledged that he was suffering from withdrawal symptoms during his probable cause hearing testimony, was subject to cross-examination at that hearing. Coleman died in August, 2001, prior to the defendant's trial. At trial, the state, over the objection of the defendant, introduced into evidence a transcript of Coleman's probable cause hearing testimony under the former testimony exception to the hearsay rule. *See* Conn. Code Evid. § 8-6(1).[83]

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[82] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." The sixth amendment right of confrontation is made applicable to the states through the due process clause of the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

[83] Section 8-6 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

"(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing...."

"With respect to the principles that govern application of the hearsay rule in criminal cases, [a]n out-of-court statement offered to establish the truth of the matter asserted is hearsay.... As a general rule, such hearsay statements are inadmissible unless they fall within a recognized exception to the hearsay rule....

"Beyond [applicable] evidentiary principles, the state's use of hearsay evidence against an accused in a criminal trial is limited by the confrontation clause of the sixth amendment.... The sixth amendment to the constitution of the United States guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. This right is secured for defendants in state criminal proceedings. *Pointer v. Texas*, 380 U.S. 400, [403] 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).... [T]he primary interest secured by confrontation is the right of cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)....

"In defining the specific limits of the confrontation clause, the United States Supreme Court consistently has held that the confrontation clause does not erect a per se bar to the admission of hearsay statements against criminal defendants.... At the same time, [a]lthough ... hearsay rules and the [c]onfrontation [c]lause are generally designed to protect similar values, [the court has] also been careful not to equate the [c]onfrontation [c]lause's prohibitions with the general rule prohibiting the admission of hearsay statements.... The [c]onfrontation [c]lause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule....

"Traditionally, for purposes of the confrontation clause, all hearsay statements were admissible if (1) the declarant was unavailable to testify, and (2) the statement bore adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).... [H]owever, the United States Supreme Court [subsequently] overruled *Rob-*

erts to the extent that it applied to testimonial hearsay statements. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In *Crawford*, the court concluded that the reliability standard set forth in the second prong of the *Roberts* test is too amorphous to prevent adequately the improper admission of core testimonial statements that the [c]onfrontation [c]lause plainly meant to exclude.... The court held, therefore, that such testimonial hearsay statements may be admitted as evidence against an accused at a criminal trial only when (1) the declarant is unavailable to testify, and (2) the defendant had a prior opportunity to cross-examine the declarant....

"In so concluding, the court drew a distinction between testimonial hearsay statements and those deemed nontestimonial. Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the [s]tates flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from [c]onfrontation [c]lause scrutiny altogether.... In other words, nontestimonial hearsay statements may still be admitted as evidence against an accused in a criminal trial if it satisfies both prongs of the *Roberts* test, irrespective of whether the defendant has had a prior opportunity to cross-examine the declarant.

"Although the court declined to define the terms testimonial and nontestimonial, it considered three formulations of th[e] core class of testimonial statements.... The first formulation consists of ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.... The second formulation consists of extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confes-

sions.... Finally, the third formulation consists of statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.... The court did not adopt any one particular formulation, noting that [t]hese formulations all share a common nucleus and then define the [c]lause's coverage at various levels of abstraction around it." (Citations omitted; internal quotation marks omitted.) *State v. Carpenter*, 275 Conn. 785, 815-18, 882 A.2d 604 (2005).

The testimony at issue in the present case, namely, Coleman's prior probable cause hearing testimony, falls squarely within *Crawford's* core class of testimonial evidence. Accordingly, the confrontation clause bars the state's use of that testimony unless Coleman was unavailable to testify at trial and the defendant had a full and fair opportunity to cross-examine Coleman at the probable cause hearing. Coleman's unavailability, due to his death, is undisputed. With respect to the defendant's prior opportunity to cross-examine Coleman, our review of the record of Coleman's probable cause hearing testimony indicates that the defendant's trial counsel questioned Coleman extensively, underscoring Coleman's struggle with drug addiction, his prior acts of misconduct, his prior inconsistent statements about the subject matter of his testimony, his lack of recollection due to the passage of time and ongoing drug abuse, and his failure to report the defendant's alleged confession either to Elan administrators or to law enforcement authorities. Indeed, the defendant does not seriously contest the fact that his trial counsel fully availed himself of the opportunity to attack Coleman's credibility vigorously at the probable cause hearing.

The defendant contends, however, that the trial court nevertheless should have barred the state from using Coleman's probable cause hearing testimony because, according

to the defendant, that testimony was inherently unreliable. As the court in *Crawford* noted, however, although the "ultimate goal [of the confrontation clause] is to ensure reliability of evidence ... it is a procedural rather than a substantive guarantee." *Crawford v. Washington*, *supra*, 541 U.S. at 61, 124 S.Ct. 1354. In other words, the confrontation clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The [c]lause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* With respect to testimonial evidence, therefore, *Crawford* makes clear that the *opportunity* for cross-examination satisfies the requirements of the confrontation clause. To the extent that Coleman's probable cause hearing testimony was not worthy of belief, as the defendant claims, the defendant had ample opportunity to challenge Coleman's credibility at that hearing.

Indeed, even if more were needed, for purposes of the confrontation clause, to establish the reliability, and, thus, the admissibility, of Coleman's testimony, that standard clearly has been satisfied. The record indicates that Coleman gave his testimony under oath and that he was subject to penalty for perjury. Moreover, his testimony was given before a judicial tribunal that kept an accurate record of the proceedings. The defendant was present at the hearing at which Coleman gave his testimony and was represented by the same counsel who later represented him at trial. *See, e.g.*, *State v. Outlaw*, 216 Conn. 492, 505, 582 A.2d 751 (1990) dentifying pre-*Crawford* factors for determination of admissibility of prior testimony). Most importantly, however, as we have explained, "defense counsel's cross-examination comported with the principal purpose of cross-examination: to challenge whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether

the declarant's intended meaning is adequately conveyed by the language he employed. [*Ohio v. Roberts*, *supra*, 448 U.S. at 71, 100 S.Ct. 2531] ...." (Citation omitted; internal quotation marks omitted.) *State v. Outlaw*, *supra*, at 506, 582 A.2d 751. The confrontation clause requires no more.

V

The defendant also contends that the trial court improperly permitted the state to adduce certain incriminatory statements that he allegedly had made while he was a resident at Elan in violation of his right to due process under the fourteenth amendment to the United States constitution[84] and article first, § 8, of the Connecticut constitution.[85] Specifically, the defendant maintains that the state's use of his statements violated his right to due process because "they were extracted while [he] was subjected to an atmosphere of physical and psychological torture and intimidation" at Elan. The defendant concedes that he did not raise this claim in the trial court, and he therefore seeks to prevail under *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989).[86]

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84 The fourteenth amendment to the United States constitution provides in relevant part: "No State shall ... deprive any person of life, liberty or property, without due process of law...."

85 Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall be ... deprived of life, liberty or property without due process of law...."

86 In *Golding*, we held that "a defendant can prevail on the claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness

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The state contends that the defendant's federal constitutional claim fails as a matter of law because the defendant cannot establish a fundamental element of that claim, namely, that state officials, rather than private actors, were responsible for eliciting the allegedly coerced statements. With respect to the defendant's state constitutional claim, the state contends that the record is inadequate for our review of that claim. We conclude that the defendant cannot establish that the statements at issue were obtained in violation of his right to due process.

The following facts are relevant to our resolution of the defendant's claims. As we explained previously, from 1978 to 1980, the defendant attended the Elan School, a residential school for troubled adolescents located in Poland Springs, Maine. The undisputed evidence revealed that the atmosphere at Elan was extremely harsh and oppressive. Residents at Elan were subjected to a behavioral modification program that was predicated on ridicule and fear. For example, residents of Elan regularly were required to attend "general meetings," the purpose of which was to confront and humiliate residents who, in the opinion of the staff, needed to be disciplined. At those meetings, residents deemed by Elan staff to be in need of discipline were subjected to physical

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of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) *State v. Golding*, *supra*, 213 Conn. at 239-40, 567 A.2d 823. Because a defendant must satisfy all four of the *Golding* prongs, "[t]he appellate tribunal is free ... to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." *Id.*, at 240, 567 A.2d 823.

and emotional hazing, and abuse from other residents and staff.[87] *See* footnote 12 of this opinion.

While attending Elan, the defendant made several statements to residents there in which he implicated himself in the victim's murder. The defendant made one such statement to Elizabeth Arnold, who testified that the defendant had told her that his brother had had sex with the victim on the night of the murder. The defendant also told Arnold that he was very drunk that night, that he had experienced some sort of blackout and that he did not know if he or his brother had killed the victim. John Higgins, another former Elan resident, testified that he and the defendant were alone one evening on the porch of their dormitory when the defendant told Higgins that he had been involved in a murder. Higgins further testified that the defendant also had stated that he had taken a golf club from the garage of his home and that he remembered running through the woods with the golf club in hand. Finally, Higgins recalled that the defendant continued to speak about the murder, stating, initially, that "he didn't know whether he did it," followed by "he may have done it," and "he must have done it," and concluding with, "I did it."

The defendant also made incriminating statements to Gregory Coleman, a resident of Elan who had been assigned to "guard" the defendant after the defendant had returned to Elan following his failed escape attempt. According to Coleman, the defendant volunteered that, "I am going to get away with murder because I am a Kennedy...." The defendant further stated that he had made romantic advances toward the victim, that she had spurned these advances and that he had beaten her to death with a golf club.

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87 As the state's attorney observed in closing argument, there existed a "concentration camp-type atmosphere" at Elan.

Another acquaintance of the defendant, Dorothy Rogers, testified that she was speaking with the defendant at an Elan social function when the defendant told her that he had been drinking on the night of the victim's death and that he could not remember what he had done. According to Rogers, the defendant further explained that his family had sent him to Elan because they were afraid that he had committed the murder. The defendant also had two conversations with Alice Dunn, another Elan resident, about the victim's murder. One such conversation occurred at Elan while the defendant was cleaning the kitchen floor, and a second conversation occurred when Dunn and the defendant were together at a restaurant. In those conversations, the defendant told Dunn that he had been drinking on the night of the victim's murder, that he did not know if he had killed the victim and that either he or his brother could have committed the murder.

The defendant contends that these statements were the product of the coercive environment at Elan and, therefore, that the statements were introduced into evidence in violation of the defendant's right to due process. For the reasons that follow, we reject the defendant's claim.[88]

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88 The defendant also challenges the admissibility of a statement that he made during a "general meeting" at Elan. At that meeting, the defendant repeatedly was accused of having murdered the victim. When the defendant denied the accusations, he was required to enter a boxing ring that was located in the room where the general meeting was taking place. Several different people took turns in the ring with the defendant, and he was required to fight each of them. The staff at Elan did not terminate the fighting until the defendant stated, "I don't know" or "I don't remember," in response to the accusation that he had murdered the victim. See footnote 12 of this opinion. This testimony was elicited, however, by the defendant's trial counsel, both on cross-examination of a state's witness and on direct examination of several defense witnesses. Because the de-

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It is well settled that "any use in a criminal trial of an involuntary confession is a denial of due process of law.... In order to be voluntary a confession must be the product of an essentially free and unconstrained choice by the maker.... If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of the confession offends due process.... The determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it ... including both the characteristics of the accused and the details of the interrogation." (Citation omitted; internal quotation marks omitted.) *State v. Reynolds*, *supra*, 264 Conn. at 54, 836 A.2d 224.

"Under the due process clause of the fourteenth amendment, [however] in order for a confession to be deemed involuntary and thus inadmissible at trial, [t]here must be police conduct, or official coercion, causally related to the confession ...." (Internal quotation marks omitted.) *Id.* Therefore, "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause ... [because] suppressing [such] statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the [federal] [c]onstitution is to substantially deter future violations...." (Citations omitted.) *Colorado v. Connelly*, 479 U.S. 157, 166, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). In the pre-

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fendant cannot complain about evidence that he himself adduced, he is not entitled to appellate review of his claim that such evidence was introduced in violation of his due process rights. We therefore limit our review of the defendant's due process claim to those allegedly coerced statements of the defendant that were introduced into evidence by the state.

sent case, the defendant does not claim that his inculpatory statements were procured, either directly or indirectly, by any state official or any person acting on behalf of the state. Accordingly, the defendant's federal constitutional claim fails as a matter of law.

With respect to the defendant's claim under the due process clause of the state constitution, it is true that, "in some instances ... the protections afforded to the citizens of this state by our constitution go beyond those provided by the federal constitution...." (Citation omitted; internal quotation marks omitted.) *State v. Medina*, 228 Conn. 281, 295-96, 636 A.2d 351 (1994). Indeed, "this court has [o]n several occasions ... left open the possibility that our state constitution might render a defendant's involuntary statements inadmissible even if they were motivated by factors other than police coercion...." (Citations omitted; internal quotation marks omitted.) *Id.*, at 295, 636 A.2d 351. We need not decide whether the state constitution bars the use of involuntary statements that are not the product of police coercion, however, because, even if we assume, arguendo, that the state constitution does prohibit the use of such statements, the record is inadequate for our review of the defendant's state constitutional claim.

"In order to be voluntary a confession must be the product of an essentially free and unconstrained choice by the maker.... If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of the confession offends due process.... The determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it ... including both the characteristics of the accused and the details of the interrogation.... Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention;

the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep....

"The trial court's findings as to the circumstances surrounding the defendant's interrogation and confession are findings of fact ... which will not be overturned unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *State v. Correa*, 241 Conn. 322, 328-29, 696 A.2d 944 (1997).

In view of the fact that the defendant failed to raise a challenge in the trial court to the admissibility, on state constitutional grounds, of the statements that he made while a resident at Elan, the trial court never made any inquiry as to the voluntariness of those statements. Because that inquiry necessarily is fact-bound, the absence of a factual predicate is fatal to the defendant's claim on appeal. In other words, "[w]e do not know ... whether the trial court, after conducting a full evidentiary hearing and applying the state constitutional standard now urged by the defendant, would have found the defendant's statements to have been involuntary.... [S]ince such a determination is a question of fact, even if we were to agree with the defendant [on his interpretation of the Connecticut constitution], we would have to remand the case to the trial court for that factual determination, rather than to grant the defendant a new trial. Since, under the test in *Golding*, we must determine whether the defendant can prevail on his claim, a remand to the trial court would be inappropriate. The first prong of *Golding* was designed to avoid remands for the purpose of supplementing the record." (Emphasis in original; internal quotation marks omitted.) *State v. Medina*, *supra*, 228 Conn. at 300-301, 636 A.2d 351.

It is true, as the defendant observes, that, although we defer to the trial court's findings on the subsidiary facts, our scope of review is plenary with respect to the ultimate question of voluntariness. *See, e.g., State v. Fields*, 265 Conn.

184, 197, 827 A.2d 690 (2003); *State v. Pinder*, 250 Conn. 385, 420-21, 736 A.2d 857 (1999). The defendant contends that, in light of the plenary nature of our review, we may decide his state constitutional claim despite the absence of any factual findings by the trial court. We disagree with the defendant's contention. Because the claim was not raised in the trial court, we do not know the precise circumstances under which the defendant's statements were made, or the defendant's state of mind when he made them. We therefore are unable to determine the extent to which the atmosphere at Elan may have affected the voluntariness of those statements, if at all. Indeed, to the extent that the defendant's statements were the subject of testimony at trial, there was nothing inherently coercive about the particular circumstances surrounding the statements to indicate that they had not been given freely. In fact, in the case of each such statement, the defendant appears to have been confiding, voluntarily, in a fellow Elan resident. On appeal, we cannot assume that the atmosphere at Elan was so coercive that any incriminating statement by the defendant necessarily was the product of that coercive environment. The defendant's state constitutional claim, therefore, fails under the first prong of *Golding*.

VI

The defendant further alleges three evidentiary improprieties which, according to the defendant, entitle him to a new trial. Specifically, the defendant claims that the trial court improperly: (1) permitted the state to introduce into evidence a prior inconsistent statement of Mildred Ix even though that statement contained inadmissible hearsay; (2) permitted the state to impeach a witness with three newspaper articles that contained sensational allegations about the defendant and the Kennedy family; and (3) barred the defendant from impeaching Kenneth Littleton with evidence of his 1977 felony convictions. We reject each of the defendant's claims.

We begin by setting forth the standard that governs our review of the trial court's evidentiary rulings. "It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference.... In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence.... Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Citations omitted; internal quotation marks omitted.) *State v. Perkins*, 271 Conn. 218, 252, 856 A.2d 917 (2004). Furthermore, "[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." *Id.*

Finally, "[i]t is a fundamental rule of appellate review of evidentiary rulings that if [the] error is not of constitutional dimensions, an appellant has the burden of establishing that there has been an erroneous ruling which was probably harmful to him.... Two lines of cases have developed setting forth the standard for reversing nonconstitutional, evidentiary improprieties. Under one line of cases, the defendant must establish, in order to obtain a reversal of his conviction, that it is more probable than not that the result of the trial would have been different if the error had not been committed. *E.g.*, *State v. Cavell*, 235 Conn. 711, 721-22, 670 A.2d 261 (1996); *State v. Buster*, 224 Conn. 546, 561, 620 A.2d 110 (1993). According to a second line of cases, the defendant must show that the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict. *See, e.g.*, *State v. Askew*, 245 Conn. 351, 371-72, 716 A.2d 36 (1998). Under either formulation, [w]hether [the improper admission of a witness' testimony] is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testi-

mony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.... Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial.... If the evidence may have had a tendency to influence the [verdict] of the jury, it cannot be considered harmless." (Citation omitted; internal quotation marks omitted.) *State v. Gonzalez*, 272 Conn. 515, 527-28, 864 A.2d 847 (2005).

A

We first address the defendant's contention that the trial court improperly admitted the prior inconsistent statement of Mildred Ix because it contained hearsay not admissible under any established hearsay exception. We are not persuaded by the defendant's claim.

At trial, the state presented the testimony of Mildred Ix, a resident of the Belle Haven neighborhood at the time of the victim's murder. Mildred Ix testified that she had been close to the defendant's deceased mother, and that she also was a good friend of the defendant's father, Rushton Skakel, Sr. She also testified that, after the death of the defendant's mother, she occasionally helped the defendant's father with problems or other matters relating to his children. On direct examination, the state asked Mildred Ix whether she recalled a conversation in which the defendant's father had confided in her that the defendant had admitted that he may have killed the victim. Mildred Ix responded that she did not. Thereafter, the state offered into evidence the prior grand jury testimony of Mildred Ix in accordance with the rule that we adopted in *State v. Whelan*, 200 Conn. 743, 513 A.2d 86, *cert. denied*, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986), which allows the "substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." *Id.*, at 753,

513 A.2d 86. The proffered testimony provided in relevant part: "I can't remember who told me that, but it was--oh, it was ... [the defendant's father]. He said ... [the defendant] had come up to him and he said, you know, I had a lot ... to drink that night and I would like to see ... if I could have had so much to drink that I would have forgotten something, and I could have murdered [the victim], and I would like to make sure at that night knowing something like that happened. So he asked to go under Sodium Pentothal[89] or whatever it was."

Defense counsel objected to the state's use of the prior grand jury testimony of Mildred Ix on the ground that the testimony contained hearsay that did not fall within any established hearsay exception. The trial court overruled the objection, concluding that, although the statement contained three levels of hearsay, each level was independently admissible under a firmly rooted hearsay exception. Specifically, the court determined that the first level of hearsay, namely, the grand jury testimony of Mildred Ix, was admissible under the hearsay exception for prior inconsistent statements carved out by this court in *Whelan*. *See* Conn. Code Evid. § 8-5(1). With respect to the second level of hearsay, namely, the statement of the defendant's father to Mildred Ix, the court determined that that statement was admissible under the residual exception to the hearsay rule. *See id.*, § 8-9. Finally, the court concluded that the third level of hearsay, namely, the defendant's alleged statement to his father, was admissible as an admission by a party opponent. *See id.*, § 8-3(1).

On appeal, the defendant does not dispute the trial court's determination that the first and third levels of hearsay

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89 Sodium Pentothal is the trade name for thiopental sodium, an anesthetic used in low doses to induce a person to talk without inhibition. *See* Sloane-Dorland Annotated Medical-Legal Dictionary (1987) p. 727.

contained in the statement of Mildred Ix were admissible under the hearsay exceptions identified by the trial court. Rather, he challenges the trial court's conclusion that his father's statement to Mildred Ix was admissible under the residual exception to the hearsay rule. Specifically, the defendant contends that the trial court placed unwarranted reliance on the nature of his father's friendship with Mildred Ix in assessing the trustworthiness and reliability of the statement. In support of this contention, the defendant maintains that communications between close friends are not so inherently reliable as to overcome the general prohibition against the admission of hearsay testimony. The defendant further asserts that the trial court improperly concluded that it was unlikely that a father would relay a matter of such a sensitive nature about his son to a close confidant unless it were true. We disagree with the defendant.

As we previously have noted, out-of-court statements offered to establish the truth of the matter asserted are hearsay. Such statements generally are inadmissible unless they fall within an exception to the hearsay rule. "A hearsay statement that does not fall within one of the traditional exceptions to the hearsay rule nevertheless may be admissible under the residual exception to the hearsay rule provided that the proponent's use of the statement is reasonably necessary and the statement itself is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule. Conn. Code Evid. § 8-9; accord *State v. Hines*, 243 Conn. 796, 809, 709 A.2d 522 (1998)." (Internal quotation marks omitted.) *State v. Aaron L*, 272 Conn. 798, 812, 865 A.2d 1135 (2005).

The requirement of reasonable necessity "is met when, unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that

evidence of the same value cannot be obtained from the same or other sources." (Internal quotation marks omitted.) *State v. Hines*, *supra*, 243 Conn. at 809, 709 A.2d 522; accord Conn. Code Evid. § 8-9, commentary. At trial, the declarant, namely, the defendant's father, testified that he did not recall confiding in Mildred Ix that the defendant had admitted to him that he may have been involved in the victim's murder. Upon examining the transcript of her grand jury testimony, Mildred Ix confirmed that she had had a conversation with the defendant's father in which he stated that the defendant wanted to take a Sodium Pentothal test, but she denied that the defendant's father had said anything about the defendant's possible involvement in the victim's murder. In light of the fact that the only two parties to the conversation, Mildred Ix and the defendant's father, did not recall the statement that the defendant allegedly had made to his father, the trial court did not abuse its discretion in concluding that admission of the statement was reasonably necessary.

We next address the trustworthiness and reliability of the statement. We previously have identified several factors that bear upon the trustworthiness and reliability of an out-of-court statement, including: (1) whether "the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification [could] be formed"; (internal quotation marks omitted) *State v. Hines*, *supra*, 243 Conn. at 810, 709 A.2d 522; (2) the closeness of the relationship between the declarant and recipient; *State v. Rivera*, 268 Conn. 351, 369, 844 A.2d 191 (2004); (3) whether the statement was made spontaneously and in confidence or obtained in response to government questioning conducted in anticipation of litigation; *id.*, at 370, 844 A.2d 191; (4) the temporal proximity between the alleged statement and the events to which the statement refers; *id.*, at 370-71, 844 A.2d 191; and (5) whether the declarant testifies at trial and is subject to cross-examination. *State v. Sharpe*, 195 Conn. 651, 665, 491 A.2d 345 (1985). Applying these fac-

tors to the present case, we conclude that the trial court did not abuse its discretion in determining that the challenged statement bore the requisite indicia of trustworthiness and reliability for admission under the residual exception to the hearsay rule.

First, Mildred Ix and the defendant's father had a personal relationship, and, from time to time, they spoke about issues involving the Skakel children. Moreover, the defendant's father made the challenged statement to Mildred Ix in confidence and on his own initiative. In such circumstances, it is most doubtful that he would have repeated the defendant's statement to Mildred Ix unless the defendant, in fact, had made such a statement to him. Moreover, as a general matter, it is highly unlikely that a father would implicate his child falsely in a serious crime, and there is nothing in the record to suggest that the defendant's father had any reason or cause to do so in the present case. Furthermore, because the defendant's father made the statement to Mildred Ix in 1980 or 1981, his recall likely was more accurate at that time than when he testified at trial more than twenty years later.[90] Finally, Mildred Ix and the defendant's father testified and were subject to cross-examination concerning the challenged statement and its contents. In such circumstances, the statement bore sufficient indicia of reliability to warrant its admission into evidence. Because the trial court also reasonably concluded that the state had a legitimate need for the statement, we reject the defendant's contention that the trial court abused its discretion in permitting the state to use the grand jury testimony of Mildred Ix as substantive evidence.

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90 We note that, in 1980 or 1981, the defendant was not a prime suspect in the victim's murder.

B

The defendant next claims that the trial court improperly permitted the state to introduce into evidence, for impeachment purposes, three irrelevant and prejudicial newspaper articles,[91] and that that impropriety entitles him to a new trial. We also reject this claim.

At trial, Geranne Ridge testified that, in 1997, the defendant attended a gathering at her home. At that gathering, Ridge overheard the defendant state, "[A]sk me why I killed my neighbor." According to Ridge, the defendant had made that comment "in jest ...." Ridge claimed that she could not recall the defendant making any other statements about his alleged involvement in the victim's murder. The state thereafter introduced into evidence, in accordance with *State v. Whelan*, *supra*, 200 Conn. at 753, 513 A.2d 86, a tape-recorded telephone conversation between Ridge and a friend, Matthew Attanian, that had taken place in February, 2002. In the conversation, Ridge told Attanian in relevant part: "[T]his is the real story. Um, [an unintelligible] name is used from now on, okay? ... Um, John Doe was, was, um, watching this particular girl at her bedroom window, changing. And he was up in a tree, masturbating, [be]cause he liked her. She went and had sex with his brother Tommy that same night, while he was outside smoking pot and doing LSD and acid and really big-time drugs, mind, you know, altering drugs. After he found out that, that his, that John Doe's brother had sex with this girl, he got so violent and he was so

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91 The three articles are: (1) "Shocking Murder Case Evidence Will Blow the Lid Off ... Kennedy Family's Darkest Secrets," National Enquirer, March 19, 2002, pp. 16-17; (2) T. Kuncl, "Michael Skakel Linked to Shocking Book Proposal That Airs ... Kennedy Dirty Laundry," Globe, February 29, 2000, pp. 4-5, 8-9; and (3) "Kennedy Heir, His Teen Love and Their Steamy 5-Year Affair," Star, May 13, 1997, pp. 5, 24-25.

screwed up, he did that to her." Attanian replied, "Wow. And he told you he did that?" Ridge responded, "Yes." Ridge also told Attanian that the defendant had told her and the guests at her home that, "I did hit her with a golf club...."

On cross-examination, Ridge maintained that the defendant had not, in fact, made any admissions to her about the victim's murder, and that her only contact with the defendant consisted of her overhearing his "off the cuff" comment, "[A]sk me why I killed my neighbor." Ridge further maintained that it was her houseguest, Marisa Verrochi, and not she, who had invited the defendant to her home, and that she had never even been introduced to the defendant. Ridge also explained that she had lied to Attanian about the defendant's admissions in order to satisfy Attanian's curiosity about the murder and to appear more knowledgeable about that crime than she actually was. In addition, Ridge testified that the information that she had relayed to Attanian "came from magazines, newspapers and from Marisa Verrochi."

On redirect examination, the state's attorney asked Ridge whether three newspaper articles that her attorney had brought to court that day were the source of the information that she had conveyed to Attanian. She responded that they were "[m]ost of the source, yes ...." The state's attorney then asked Ridge to examine the three publications and to identify any reference in the articles concerning the details of the statement attributed to the defendant by Ridge in her taperecorded telephone conversation with Attanian. Defense counsel objected to this inquiry on the ground that the articles were not in evidence, and the court sustained the objection. The state's attorney thereafter questioned Ridge about each specific fact that she had attributed to the defendant in her telephone conversation with Attanian, inquiring as to whether the fact was mentioned in the three newspaper articles.

Ridge responded that each such fact was contained in one or more of the articles.[92] At that point, the state sought to introduce the three newspaper articles into evidence, and defense counsel objected, claiming that the articles were irrelevant and prejudicial. The trial court overruled defense counsel's objection. The court instructed the jury, however, that the articles were not being admitted for the truth of the information contained therein but, rather, for the limited purpose of impeaching Ridge's testimony that they had been the source of the details that she had related to Attanian. The state's attorney then asked Ridge to examine the articles and to point out those portions of the articles that contained the information that she had provided to Attanian. Ridge responded that she had not thoroughly reviewed the articles, but that they did not contain some of the details that she had related to Attanian in their telephone conversation.[93] On re-

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92 This colloquy proceeded in relevant part:

"[State's Attorney]: [The newspaper articles] should contain information about the defendant's spying on the victim?

"[Ridge]: One of those newspapers did, Your Honor, in a tree.

"[State's Attorney]: And, about being in a tree masturbating? "

[Ridge]: Yes.

"[State's Attorney]: And, about him really liking her?

"[Ridge]: Yes, sir.

"[State's Attorney]: And, about him having done pot and LSD?

"[Ridge]: Yes, sir.

"[State's Attorney]: And, about the defendant having learned that his brother had had sex with the victim?

"[Ridge]: Yes, sir.

"[State's Attorney]: And, about the fact that learning this so screwed the defendant up that he did that to her, killed her or murdered her? "

[Ridge]: Yes, sir."

93 This colloquy proceeded in relevant part:

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cross-examination, Ridge testified that the three articles were not the only sources of the information that she had conveyed to Attanian. At the conclusion of the trial, the court again instructed the jury regarding the limited purpose for which the articles had been introduced into evidence.

The defendant contends that the trial court abused its discretion in admitting the newspaper articles into evidence because they were irrelevant and prejudicial. Specifically, the defendant maintains that the articles contain sensational stories of sex, alcohol and drugs involving the defendant and the Kennedy family, generally "underscored the pervasive theme of the state's case that the defendant believed [that] he

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"[State's Attorney]: Wouldn't you agree that there is nothing in any of those three publications that mentions the defendant climbing a tree and spying on a victim?

"[Ridge]: Not that I could see ... but I wasn't--from what I could briefly scan.

* * *

"[State's Attorney]: Nothing in any of those articles about anybody masturbating in a tree?

"[Ridge]: Not that I could see.

"[State's Attorney]: Or doing LSD or pot or anything like that?

"[Ridge]: Yes, there was a mention of illicit drug use, yes.

"[State's Attorney]: How about learning that his brother had had sex earlier [in] the night with the victim?

"[Ridge]: I believe something to that effect was mentioned. I am not positive.

"[State's Attorney]: We will let the jury decide that when they deliberate. And getting so screwed up that he did that to her, anything in those articles about that?

"[Ridge]: Nothing about that, but just the illicit drug use was mentioned."

was above the law because he was a Kennedy," and otherwise suggested that the defendant, like other members of his family, was a liar who had much to hide.[94]

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[94] We note that only the Globe and National Enquirer articles mention the defendant or the present case. The Globe article is largely devoted to purported Kennedy secrets, many of which allegedly were to be revealed in the defendant's unfinished and unpublished tell-all book; apparently, the book proposal had been leaked to the press. The article does state, however, that the defendant admitted that he had "lied to investigators probing the murder of [the victim] in 1975"; T. Kuncl, "Michael Skakel Linked to Shocking Book Proposal That Airs ... Kennedy Dirty Laundry," Globe, February 29, 2000, p. 4; and that he once was required to wear a sign around his neck indicating that he had murdered the victim when he was attending the Elan School. Id., p. 9. Although these statements relate directly to the defendant and his purported involvement in the victim's murder, other evidence adduced at trial established the same facts. In particular, the defendant was not truthful with the police. He told them that, on the night of the murder, he went to bed shortly after returning from James Dowdle's house and that he did not leave the house thereafter, even though he subsequently admitted that, later that evening, he masturbated in a tree outside the victim's room. Moreover, the defendant himself presented evidence demonstrating that Elan officials had accused him of murdering the victim and that he had been forced to say and do things, including wearing signs, indicating that he had murdered the victim. In addition, the Globe article indicates that, according to the leaked book proposal, the defendant disapproved of his family's "secrets," and did not intend to perpetuate them. For example, the article quotes the defendant as stating: "I am a member of a family sick unto death with generations of secrets"; (internal quotation marks omitted) id., p. 4; "I have concluded that there is no escape from recurrent tragedy that does not begin with telling the truth"; (internal quotation marks omitted) id.; and " 'I have seen wasted lives, tremendous pain and needless death' due to the Kennedy secrets ... [a]nd [I don't] want to be a part of it any longer." Id., p. 9. We note, finally, that the Globe article contains a dis-

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It is well established that "[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue.... One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable.... Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worth or safe to be admitted in the proof of the latter.... Evidence is not rendered inadmissible because it is not conclusive. All that is required

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claimer that the defendant's attorney had informed the Globe that "the book proposal does not contain the words of [the defendant] and that [the defendant] did not endorse or approve the text of the proposal. [The defendant] claims it was written by the co-author, Richard Hoffman.

"[The defendant's] lawyer says the proposal was 'leaked and circulated in an effort to discredit [the defendant] and various members of his family.' " *Id.*

The National Enquirer article also contains certain references to the defendant and his purported involvement in the victim's murder. In particular, the article mentions the allegedly close friendship between the defendant and a Kennedy family babysitter and recounts the speculation of a "friend" that the defendant may have confessed to the babysitter that he had murdered the victim. "Shocking Murder Case Evidence Will Blow the Lid Off ... Kennedy Family's Darkest Secrets," National Enquirer, March 19, 2002, pp. 16-17. The article also contains, however, a denial of that speculative comment by the defendant's attorney. See id., p. 17. Additionally, the article mentions "talk of a Kennedy family cover-up" of the victim's murder. *Id.* The article states that the defendant's brother, Thomas Skakel, "was shipped off to Ireland a month after the investigation began. And [the defendant] refused to cooperate with police." *Id.*

is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not [unfairly] prejudicial or merely cumulative." (Internal quotation marks omitted.) *State v. Colon*, 272 Conn. 106, 200-201, 864 A.2d 666 (2004), *cert. denied*, --- U.S. ----, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005); *see also* Conn. Code Evid. § 4-1.

We agree with the trial court that the newspaper articles were relevant to the state's contention that Ridge did not, in fact, obtain the information that she had conveyed to Attanian from the newspaper articles but, rather, from the defendant himself, as she had represented to Attanian.[95] In light of Ridge's testimony that the newspapers, and not the defendant, were the source of that information, the fact that most of the information was not contained in the articles provided a proper avenue of impeachment for the state.

With respect to the prejudicial effect of evidence admitted at trial, we have stated that, "[a]lthough relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value.... [T]he trial court's discretionary determination that the probative value of evidence is ... outweighed by

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95 The defendant notes that the National Enquirer article, which was published on March 19, 2002, postdated Ridge's conversation with Attanian and, therefore, that article was irrelevant to the issue of from what source Ridge had obtained the information about the defendant that she had provided to Attanian. Although we agree that Ridge could not possibly have obtained the information from that article, that fact supports, rather than undermines, the state's claim that, contrary to Ridge's testimony, the article was not a source of the information that she had provided to Attanian. Moreover, defense counsel neither objected to the state's use of the National Enquirer article on that ground nor offered to stipulate that the article could not have been the source of any of the facts to which Ridge had referred in her conversation with Attanian.

its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown.... [B]ecause of the difficulties inherent in this balancing process ... every reasonable presumption should be given in favor of the trial court's ruling.... Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates *undue* prejudice so that it threatens an injustice were it to be admitted.... [Accordingly] [t]he test for determining whether evidence is unduly prejudicial is not whether it is damaging to the [party against whom the evidence is offered] but whether it will improperly arouse the emotions of the jur[ors]." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State v. Sandoval*, 263 Conn. 524, 544, 821 A.2d 247 (2003); *see also* Conn. Code Evid. § 4-3.

Whether the trial court reasonably concluded that the probative value of the articles was not outweighed by their potential prejudicial effect presents a close question. Our review of the articles reveals that they are comprised primarily of sensationalized reports of allegedly scandalous conduct by members of the Kennedy family. Although the articles also mention the defendant's abuse of drugs and alcohol, ample evidence of that abuse was admitted into evidence at trial. Moreover, to the extent that the articles refer to the present case and to the defendant's purported involvement in the victim's murder, those references are relatively brief and, with minor exceptions, involve facts that already were properly before the jury. See footnote 94 of this opinion. Nevertheless, because of the sensational nature and tone of the articles, their introduction into evidence created some risk of prejudice to the defendant. That risk, however, undoubtedly was minimized by virtue of the trial court's limiting instruc-

tions.[96] We need not decide whether the trial court abused its discretion in permitting the state to introduce the articles into evidence, however, because the defendant cannot establish that any prejudice that may have flowed from their admission into evidence was so substantial as to warrant a new trial. In other words, under either formulation of the test that this court applies in determining whether an evidentiary error warrants a new trial; compare *State v. Cavell*, *supra*, 235 Conn. at 721-22, 670 A.2d 261 (result of trial likely would have been different but for evidentiary impropriety), with *State v. Askew*, *supra*, 245 Conn. at 371-72, 716 A.2d 36 (prejudice resulting from erroneous evidentiary ruling is so substantial as to undermine confidence in fairness of verdict); the defendant cannot establish harm because the jury already was aware of most of the facts contained in the articles; *see State v. Gonzalez*, *supra*, 272 Conn. at 528-29, 864 A.2d 847

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[96] Immediately following the admission of the articles, the trial court instructed the jury that the articles were "not being admitted for the truth of what they contain.... They are not being admitted for the truth of what they contain, only in connection with this witness' testimony that she collected them as some sources of information relating to these claims that she gave Mr. Attanian, that she claims not to have known directly from the defendant...." The trial court reiterated its limiting instruction in its charge to the jury: "[Ridge] disavowed some of the statements she attributed to the defendant about what he had said concerning the killing and what she later related to her then friend Attanian. You will recall [Ridge] identifying certain tabloids as representative of the sources she used to make such statements. The tabloids, the papers, were not admitted for the truth of what they published but, instead, as evidence that they did not contain certain information she had accredited to the defendant and related to Attanian. So, the state is asking you to believe that she heard these things from the defendant. That's for you to decide. But this is why those exhibits were admitted, and you must follow this and other limiting instructions."

("[i]t is well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely cumulative of other validly admitted testimony" [internal quotation marks omitted]); and because the trial court repeatedly instructed the jury regarding the limited admissibility of the articles. *See State v. McIntyre*, 242 Conn. 318, 330, 699 A.2d 911 (1997) ("[t]he jury is presumed to follow the court's instructions unless there is a fair indication to the contrary" [internal quotation marks omitted]). Accordingly, we reject the defendant's claim.

C

The defendant also contends that the trial court improperly prohibited him from impeaching Kenneth Littleton with evidence of Littleton's three prior convictions for burglary in 1977. We disagree.

"Generally, evidence that a witness has been convicted of a crime is admissible to impeach his credibility if the crime was punishable by imprisonment for more than one year. General Statutes § 52-145(b); Conn. Code Evid. § 6-7(a). In determining whether to admit evidence of a conviction, the court shall consider: (1) the extent of the prejudice likely to arise; (2) the significance of the particular crime in indicating untruthfulness; and (3) the remoteness in time of the conviction. Conn. Code Evid. § 6-7(a); *see State v. Nardini*, 187 Conn. 513, 522, 447 A.2d 396 (1982) (recognizing same three part test at common law prior to adoption of Connecticut Code of Evidence). Moreover, [i]n evaluating the separate ingredients to be weighed in the balancing process, there is no way to quantify them in mathematical terms.... Therefore, [t]he trial court has wide discretion in this balancing determination and every reasonable presumption should be given in favor of the correctness of the court's ruling .... Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done."

(Citation omitted; internal quotation marks omitted.) *Label Systems Corp. v. Aghamohammadi*, 270 Conn. 291, 307, 852 A.2d 703 (2004). With respect to the remoteness prong of the balancing test, we have endorsed a general guideline of ten years from conviction or release from confinement for that conviction, whichever is later, as an appropriate limitation on the use of a witness' prior conviction. *See, e.g., id.*, at 313, 852 A.2d 703; *State v. Dorans*, 261 Conn. 730, 755- 56, 806 A.2d 1033 (2002). "[T]he ten year benchmark ... [however] is not an absolute bar to the use of a conviction that is more than ten years old, but, rather, serves merely as a guide to assist the trial judge in evaluating the conviction's remoteness." (Internal quotation marks omitted.) *Label Systems Corp. v. Aghamohammadi, supra*, at 313, 852 A.2d 703. We have recognized, moreover, that "convictions having some special significance upon the issue of veracity surmount the standard bar of ten years and qualify for the balancing of probative value against prejudice." (Internal quotation marks omitted.) *State v. Dorans, supra*, at 755-56, 806 A.2d 1033.

Although Littleton's burglary convictions are probative of a lack of honesty; *See State v. Cooper*, 227 Conn. 417, 436, 630 A.2d 1043 (1993) ("[b]reaking and entering with criminal intent [is] a crime ... associated with larceny and, therefore, implying dishonesty in the general sense directly affecting the credibility of [a] witness"); *see also State v. Askew, supra*, 245 Conn. at 363-64, 716 A.2d 36 (noting that crimes involving larcenous intent are probative of lack of honesty); we nevertheless conclude that the trial court did not abuse its discretion in excluding them. The twenty-five year time span between Littleton's convictions and his trial testimony[97] greatly surpasses the ten year benchmark. Even

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[97] The record reveals that Littleton did not serve a prison sentence in connection with his burglary convictions. Therefore, it is appropriate to

[Footnote continued on next page]

though the crimes reflect a lack of honesty, their probative value was minimal, at best, in view of the long span of time between the convictions and Littleton's testimony. *See, e.g., State v. Dorans, supra*, 261 Conn. at 756, 806 A.2d 1033 (trial court properly excluded conviction that involved larcenous intent and that was more than twenty years old). Consequently, the trial court acted within its discretion in concluding that the convictions were too remote to have any meaningful bearing on Littleton's veracity as a witness.

The defendant claims, nevertheless, that the trial court improperly excluded the proffered impeachment evidence because that evidence was not unduly prejudicial to the state and because of Littleton's importance to the defendant's theory of the case. In support of this claim, the defendant relies primarily on *State v. Askew, supra*, 245 Conn. 351, 716 A.2d 36. In *Askew*, the defendant, Willie Askew, was convicted of robbery in the first degree. *Id.*, at 352, 716 A.2d 36. At trial, Askew testified on his own behalf, and the state was permitted to impeach him with evidence of his prior robbery conviction. *See id.*, at 359, 716 A.2d 36. The robbery victim, who was the key state's witness; *see id.*, at 369, 716 A.2d 36; also had a prior felony larceny conviction, which, at the time of the trial, was ten years and seven months old. *Id.*, at 356, 716 A.2d 36. The trial court barred Askew from using the

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look at the time between the year of Littleton's testimony, namely, 2002, and the year of the convictions, namely, 1977, in determining the time span between them for purposes of addressing the issue of whether the remoteness of Littleton's prior convictions warrants their exclusion from evidence. *See* Conn. Code Evid. § 6-7(a), commentary (for purposes of remoteness, court looks to "the later of the date of conviction or the date of the witness' release from the confinement imposed for [that] conviction").

victim's prior conviction for impeachment purposes because the conviction was more than ten years old. *See id.*, at 357, 716 A.2d 36. On appeal, Askew claimed that the trial court had abused its discretion in prohibiting him from impeaching the victim with his prior conviction, and we agreed. *Id.*, at 371, 716 A.2d 36. We observed that, "as a general matter, it is unlikely that the use of a criminal conviction to impeach a state's witness will give rise to any undue prejudice";[98] *id.*, at 363, 716 A.2d 36; that the crime underlying the victim's conviction was probative of a lack of honesty; *id.*; and that the victim's conviction, "while exceeding our ten year benchmark for presumptive admissibility, [was] not so remote as to impair, to any meaningful degree, its probative value."[99] *Id.*, at 364, 716 A.2d 36. Additionally, we observed that the state's case rested almost exclusively on the testimony of the victim. *See id.*, at 369, 716 A.2d 36. Because the outcome of the trial in that case "turned on the jury's assessment of the relative credibility of the victim and [Askew]"; *id.*, at 369-70, 716 A.2d 36; we were persuaded that the trial court improperly had failed to consider the centrality of the victim's testimony and, thus, the importance of

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98 We recognized, however, that "there may be circumstances [in which] the use of a prior conviction to impeach a state's witness will give rise to substantial prejudice to the state. In such circumstances, the trial court must determine whether the prejudice is so overriding as to outweigh the conviction's probative value." *State v. Askew*, *supra*, 245 Conn. at 363 n. 18, 716 A.2d 36.

99 We further concluded that "any possible risk of prejudice to the state was reduced substantially by the fact that [Askew] sought to impeach the victim with a single prior conviction rather than multiple convictions." *State v. Askew*, *supra*, 245 Conn. at 363, 716 A.2d 36. In the present case, the defendant sought to impeach Littleton with three prior felony convictions.

his credibility, in assessing the probative value of the proffered impeachment evidence. *See id.*, at 370- 71, 716 A.2d 36. We concluded, under all of the circumstances, that the trial court had abused its discretion in excluding the victim's prior felony conviction. *Id.*, at 371, 716 A.2d 36.

In contrast to the conviction at issue in *Askew*, the span between Littleton's prior felony convictions and his trial testimony is not close to the ten year benchmark for admissibility; it surpasses that benchmark by fifteen years. Furthermore, Littleton was not a key state's witness; indeed, he testified that he had no knowledge of the circumstances surrounding the murder of the victim. Although the defendant sought to advance the possibility that Littleton had murdered the victim, the evidence adduced by the defendant in support of that theory was, at best, thin. Finally, because the defendant's third party culpability defense did focus on Littleton, the state had a legitimate concern that the defendant's use of Littleton's twenty-five year old convictions would give rise to an undue risk that the jury's attention would be diverted from the important issues in the case. We therefore conclude that the trial court did not abuse its discretion in excluding evidence of those convictions.

VII

Lastly, the defendant claims that his right to a fair trial was violated as a result of prosecutorial misconduct during closing arguments. Specifically, the defendant contends that the state's attorney improperly: (1) maintained that the defendant had fabricated a story to explain the possible future discovery of his semen at the scene of the crime; (2) asserted that the Skakel family had conspired to fabricate an alibi for the defendant; (3) contended that the Skakel family believed that the defendant was guilty of the murder of the victim; (4) referred to the defendant as a "killer" and a "spoiled brat"; (5) asserted that the defendant had masturbated on the victim's body; and (6) misused evidence in an audiovisual pres-

entation to make it appear that the defendant had confessed to the murder. Although the defendant acknowledges that he did not object to any of the alleged misconduct that he challenges on appeal, he nevertheless claims that he is entitled to a new trial. We disagree.

We begin our analysis by setting forth the legal principles that govern our review of the defendant's unpreserved claims of prosecutorial misconduct. "In [*State v. Stevenson*, 269 Conn. 563, 849 A.2d 626 (2004)], we clarified our due process analysis in cases involving incidents of prosecutorial misconduct to which no objection has been raised at trial.[100] We explained that, in such cases, it is unnecessary for the defendant to seek to prevail under the specific requirements of ... *Golding* ... and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. The reason for this is that the touchstone for appellate review of claims of prosecutorial misconduct is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by this court in *State v. Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). As we stated in that case: In determining whether prosecutorial misconduct was so serious as to amount to a denial of due process, this court, in conformity with courts in other jurisdictions, has focused on several factors. Among them are the extent to which the misconduct was invited by defense conduct or argument ... the severity of

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100 We note that the defendant filed his principal brief before the issuance of our opinion in *Stevenson*. In that brief, the defendant sought review of his unpreserved claims of prosecutorial misconduct under *Golding*. In his reply brief, which was filed after the issuance of our opinion in *Stevenson*, the defendant sought review under the analysis that we prescribed in *Stevenson*. We, of course, review the defendant's claims in accordance with our analysis in *Stevenson*.

the misconduct ... the frequency of the misconduct ... the centrality of the misconduct to the critical issues in the case ... the strength of the curative measures adopted ... and the strength of the state's case....

"Regardless of whether the defendant has objected to an incident of misconduct, a reviewing court must apply the *Williams* factors to the entire trial, because there is no way to determine whether the defendant was deprived of his right to a fair trial unless the misconduct is viewed in light of the entire trial. The application of the *Williams* factors, therefore, is identical to the third and fourth prongs of *Golding*, namely, whether the constitutional violation exists, and whether it was harmful. *State v. Golding*, *supra*, 213 Conn. at 240, 567 A.2d 823. Requiring the application of both *Williams* and *Golding*, therefore, would lead ... to confusion and duplication of effort. Furthermore, the application of the *Golding* test to unchallenged incidents of misconduct tends to encourage analysis of each incident in isolation from one another. Because the inquiry must involve the entire trial, all incidents of misconduct must be viewed in relation to one another and within the context of the entire trial. The object of inquiry before a reviewing court in [due process] claims involving prosecutorial misconduct, therefore, is always and only the fairness of the entire trial, and not the specific incidents of misconduct themselves. Application of the *Williams* factors provides for such an analysis, and the specific *Golding* test, therefore, is superfluous. In light of these observations, we conclude that, following a determination that prosecutorial misconduct has occurred, regardless of whether it was objected to, an appellate court must apply the *Williams* factors to the entire trial.

"This does not mean, however, that the absence of an objection at trial does not play a significant role in the application of the *Williams* factors. To the contrary, the determination of whether a new trial or proceeding is warranted de-

pends, in part, on whether defense counsel has made a timely objection to any [incident] of the prosecutor's improper [conduct]. When defense counsel does not object, request a curative instruction or move for a mistrial, he presumably does not view the alleged impropriety as prejudicial enough to seriously jeopardize the defendant's right to a fair trial.... [Thus], the fact that defense counsel did not object to one or more incidents of misconduct must be considered in determining whether and to what extent the misconduct contributed to depriving the defendant of a fair trial and whether, therefore, reversal is warranted.... *State v. Stevenson*, *supra*, 269 Conn. at 572-76, 849 A.2d 626." (Citation omitted; internal quotation marks omitted.) *State v. Ancona*, 270 Conn. 568, 591-93, 854 A.2d 718 (2004), *cert. denied*, 543 U.S. 1055, 125 S.Ct. 921, 160 L.Ed.2d 780 (2005).

"We now address the standards that guide our review of claims of prosecutorial misconduct during closing arguments. [P]rosecutorial misconduct of a constitutional magnitude can occur in the course of closing arguments.... In determining whether such misconduct has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument.... Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom.... Moreover, [i]t does not follow ... that every use of rhetorical language or device [by the prosecutor] is improper. ... The occasional use of rhetorical devices is simply fair argument.... Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case.... This heightened duty derives from our long recognition of the special role played by the state's attorney in a criminal trial.

He is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. In discharging his most important duties, he deserves and receives in peculiar degree the support of the court and the respect of the citizens of the county. By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused be guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha [s] no right to consider....

"Or to put it another way while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. ... A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows." (Internal quotation marks omitted.) *Id.*, at 593-95, 854 A.2d 718.

It is well established, furthermore, "that a prosecutor, in fulfilling his duties, must confine himself to the evidence in the record.... Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument....

"A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence. ... Moreover, when a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." (Citation omitted; internal quotation marks omitted.) *State v. Ceballos*, 266 Conn. 364, 400, 832 A.2d 14 (2003). In addition, "[a] prosecutor may not appeal to the emotions, passions and prejudices of the jurors.... [S]uch appeals should be avoided because they have the effect of diverting the [jurors'] attention from their duty to decide the case on the evidence.... When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors which are likely to skew that appraisal.... No trial--civil or criminal--should be decided upon the basis of the jurors' emotions." (Internal quotation marks omitted.) *State v. Ancona*, *supra*, 270 Conn. at 602, 854 A.2d 718.

Thus, "[i]n analyzing claims of prosecutorial misconduct, we engage in a two step analytical process. The two steps are separate and distinct: (1) whether misconduct occurred in the first instance; and (2) whether that misconduct deprived a defendant of his due process right to a fair trial.... As we have indicated, our determination of whether any improper conduct by the state's attorney violated the defendant's fair trial rights is predicated on the factors set forth in *State v. Williams*, *supra*, 204 Conn. at 540, 529 A.2d 653, with due consideration of whether that misconduct was objected to at trial." (Citation omitted; internal quotation marks omitted.) *State v. Ancona*, *supra*, 270 Conn. at 595-96, 854 A.2d 718. With these overarching principles in mind, we turn to the defendant's specific allegations of prosecutorial misconduct during closing argument.

A

The defendant claims that the state's attorney falsely asserted that the defendant had fabricated a story about masturbating on or near the body of the victim for the purpose of explaining the possible future discovery of his semen, through the use of DNA technology, at the scene of the crime. The defendant also contends that the state's attorney improperly imputed this motive to the defendant on the basis of an assertion that was not supported by the record, namely, that the investigatory value of DNA technology was widely known when the defendant made certain statements, in the early 1990s, in furtherance of his masturbation story. The defendant contends that, contrary to the state's attorney's assertion, the evidence established that DNA technology was only just emerging in the early 1990s and, therefore, its value was not widely known.

The following additional facts and procedural history are relevant to our resolution of this claim. As we previously have explained, the defendant initially told investigators that he had not left his home after returning from the home of his cousin, James Dowdle, on the night of the murder. At trial, however, several witnesses testified that the defendant had told them that, on the night of the murder, he had left his house and masturbated in the vicinity of the location where the victim's body was found. Michael Meredith, one of the state's witnesses, testified that, in 1987, the defendant stated that, on the night of the murder, he had climbed a tree on the Moxley property and masturbated while watching the victim through her bedroom window. Another witness, Andrew Pugh, testified that, in 1992, the defendant told him that, on the night that the victim was murdered, he had masturbated in the tree under which the victim's body was found. Pugh further testified that immediately after the defendant told him this story, Pugh received more than two dozen telephone calls from Sutton Associates, an investigatory agency that the

defendant had retained, requesting that Pugh meet with them to discuss the victim's murder. When Pugh did not return the calls, the defendant contacted Pugh and implored him to speak to the investigators, explaining that the investigators were trying to "clear" the defendant's name.

The state also introduced the prior testimony of Gregory Coleman, who testified that while he and the defendant were residents at the Elan School, the defendant confessed to him that, two days after he killed the victim with a golf club, he had returned to her body and masturbated on it. In addition, the state introduced a 1997 tape-recorded conversation between the defendant and Richard Hoffman in which the defendant explained to Hoffman how he had snuck out of the house on the night of the murder and masturbated in a tree on the Moxley property.

Finally, the state adduced the testimony of Henry Lee, the state's former chief criminalist, who explained that he had published a paper in 1979 about the potential application of DNA technology to forensic science. Lee further testified that, by the end of 1989, DNA technology was being used in criminal investigations in the United States, although, according to Lee, DNA technology still was a new and developing technique as of 1991. Lee also explained that, by the early 1990s, DNA testing had become even "more sensitive" through a new method of DNA typing known as the polymerase chain reaction.

In his closing argument, the state's attorney asserted that the reason that the defendant began telling people that he had left his house on the night of the murder and masturbated in the vicinity of the victim's body was because he feared that his original "1975 alibi wouldn't cover every eventuality, particularly that his semen might one day be identified in a crime lab, or even that one day, someone might surface who had actually seen him over there." The state's attorney further argued that, by the early 1990s, the defendant's need to

establish an alternative explanation for the presence of his semen at the crime scene took on a particular urgency because, by then, DNA had become "the real deal in criminal investigation," and because "every criminal investigator on the planet was totally attuned to this miraculous new technology, and, of course, that would include the [private investigators] that the Skakel family had hired to assist them in the defense, Sutton Associates." Thus, according to the state's attorney, what began in 1987 as a story of spying on the victim while masturbating in a tree outside the victim's bedroom window had, by 1992, evolved into a story of masturbating in the same tree under which the victim's body was found.

The defendant contends that the state's attorney's argument was improper for two reasons. First, the defendant claims that the state's attorney intentionally misrepresented the chronology of events to make it appear as though the defendant, with the assistance of Sutton Associates, had devised the masturbation story only after Lee became involved in the investigation in the early 1990s. Second, the defendant contends that the state's attorney, without support in the record and for the purpose of advancing the theory that the defendant had fabricated the masturbation story in the early 1990s in anticipation of the possible discovery of DNA evidence at or near the crime scene, improperly asserted that, by 1992, DNA was the "real deal" in criminal investigations, and that "every criminal investigator on the planet was totally attuned to this miraculous new technology...."

We reject the defendant's first contention that the state's attorney misrepresented the chronology of events in order to make it appear that the defendant began telling his masturbation story only after Lee had entered the investigation. On the contrary, the state's attorney referred to Meredith's testimony throughout his closing argument, explicitly stating that the defendant had related the masturbation story to Meredith in 1987, five years before Lee's involvement in the case.

The state's attorney underscored Pugh's testimony because it lent support to the state's theory regarding the defendant's motive for disseminating the masturbation story in the first place: as we have explained, Pugh testified that, in 1992, the defendant stated that he had masturbated in the same tree under which the victim's body was found. Pugh further testified that, immediately after the defendant told him this story, he began receiving repeated telephone calls from the defendant's private investigators requesting that Pugh meet with them to discuss the victim's murder. Pugh also explained that, when he did not return their calls, the defendant himself called to urge him to talk to the investigators. In light of the conduct of the defendant and his investigators, it was not improper for the state's attorney to argue that the defendant, or Sutton Associates, or both, in 1992, considered it urgent that Pugh repeat the story that the defendant had told him. It also was not improper for the state's attorney to argue that the defendant's urgent interest in the matter likely was related to the fact that the state recently had reopened its investigation into the victim's murder, and that Lee had part of that investigation. Because the state's attorney merely urged the jury to draw reasonable inferences from the facts, the argument was not improper.

We also are not persuaded that the defendant's due process rights were violated by the state's attorney's assertion that DNA technology and its efficacy were well-known in 1992. We acknowledge that there was not a great deal of testimony regarding the precise state of DNA science as of that date, and that, in light of the relative paucity of such testimony, the state's attorney's comments reasonably might be characterized as something of an overstatement of that testimony. Nevertheless, by 1992, professional investigators, such as Sutton Associates, undoubtedly were aware of DNA technology and its enormous potential in the forensic

arena.[101] We are mindful, also, that "closing arguments often have a rough and tumble quality about them, [and that] some leeway must be afforded to the advocates in offering arguments to the jury in final argument." (Internal quotation marks omitted.) *State v. Morales*, 90 Conn. App. 82, 95 n. 7, 876 A.2d 561, *cert. denied*, 275 Conn. 924, 883 A.2d 1250 (2005). As we previously have noted, moreover, defense counsel's failure to object to the state's attorney's argument when it was made indicates that he did not believe that it was unfair in view of the record of the case at the time. *E.g.*, *State v. Stevenson*, *supra*, 269 Conn. at 576, 849 A.2d 626. As we also have observed, "defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to ... refute that argument [later]." (Internal quotation marks omitted.) *Id.* That may have occurred in the present case. In any event, we reiterate that "[defense] counsel's failure to object at trial, while not by itself *fatal* to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error .... Put differently ... prosecutorial misconduct claims [are] not intended to provide an avenue for the tactical sandbagging of our trial courts, but rather, to address gross prosecutorial improprieties that ... have deprived a criminal defendant of his right to a fair trial." (Emphasis in original; internal quotation marks omitted.) *Id.* Even if the state's attorney's characterization of the state of DNA evidence as of the early 1990s was somewhat overblown, that

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[101] For example, we take judicial notice of the fact that DNA technology was being used in the investigation of criminal offenses in this state as early as 1989. *See State v. Hammond*, 221 Conn. 264, 278, 604 A.2d 793 (1992).

characterization did not represent the kind of gross or flagrant impropriety for which a new trial is required.

B

The defendant claims that the state's attorney improperly argued that the Skakel family had created an alibi for the defendant. We disagree with the defendant's claim.

At trial, the state adduced evidence that, on the day that the victim's body was discovered, Kenneth Littleton was directed to take the defendant, his brothers Thomas Skakel and John Skakel, their cousin James Dowdle, and James Terrien to the family's hunting lodge in Windham, New York, which he did the following morning. On cross-examination, Littleton testified that he likely was the one who proposed to the "suits" and lawyers who came to the Skakel home on the day following the murder that he should take the Skakel children to Windham. On redirect examination, however, Littleton indicated that the decision to take the children to Windham probably had been made as a group. Littleton testified that, because, at the time, he could not have known that the Skakels had a house in Windham, he likely heard about the house from one of the "suits," and that he then volunteered to take the children there. The state also adduced testimony from the defendant's father, Rushton Skakel, Sr., who stated that, although he did not specifically recall directing Littleton to take the children to Windham, Littleton would not have had the authority to take the children anywhere without his permission.

Finally, the state adduced the testimony of James Lunney, a former detective with the Greenwich police department. Lunney testified that he had contacted the defendant's father on November 14, 1975, and requested that he bring his children to the station to provide statements about their whereabouts and activities at and around the time of the victim's murder. According to Lunney, the next day, the defendant's father brought all of his children, with the exception of

Rushton Skakel, Jr., who was away at college, to the police station. Lunney also testified that the defendant's father remained in the room with the defendant while the defendant gave his statement.

In his closing argument, the state's attorney asserted that the defendant's family, and in particular the defendant's father, had "produced" an alibi for the defendant after the murder. Specifically, the state's attorney argued that, on the day that the victim's body was found, someone in the family, most likely the defendant's father, had decided to send the defendant, Thomas Skakel and John Skakel to Windham to shield them from the police and to give them time to construct their story. The state's attorney further maintained that, had the trip simply been for the purpose of protecting the Skakel children from a killer on the loose, the defendant's younger brothers and sister also would have gone to Windham, but they had remained at home. Finally, the state's attorney asserted that a few weeks after the trip--and after the defendant's alibi witnesses had been afforded a sufficient opportunity to craft a cohesive story--the defendant's father escorted all of those witnesses to the police station, where they each gave an unsworn statement to the police.

The defendant contends that the foregoing argument was not based on the facts in evidence. We disagree.

With respect to the remarks of the state's attorney about the trip to Windham, the evidence adduced at trial indicated that, on the day that the victim's body was discovered, several unidentified persons, whom Littleton described as "suits," came to the Skakel residence to help take control of the situation. While they were there, it was decided that Littleton would take the defendant, his brothers Thomas Skakel and John Skakel, their cousin Dowdle, and Terrien to the family's hunting lodge in Windham. The defendant's father also testified that Littleton would not have had the authority to take his children anywhere without his permission.

Accordingly, we conclude that the state's argument that Littleton was directed to take the four boys out to Windham on the basis of "[s]omeone seeing the police all over the place" was not improper because it was founded on reasonable inferences drawn from the testimony of Littleton and the defendant's father. Moreover, because the only family members to go to Windham were the chief proponents of the defendant's alibi--the defendant's other siblings were left behind--it also was proper for the state's attorney to argue that the trip had been arranged for the purpose of placing these crucial witnesses temporarily out of reach of the authorities in order to give them time to prepare a unified account of the events that occurred on the night of the murder.

We also are not persuaded that the state's attorney transcended the bounds of proper argument when he urged the jury to infer that the defendant's father had been instrumental in orchestrating the defendant's alibi. There is nothing unusual, of course, about the defendant's father's act of accompanying his children to the police station. The state's attorney urged the jury to consider that conduct, however, in light of the fact that a number of persons had descended on the Skakel residence immediately after the discovery of the victim's body, apparently for the purpose of managing the situation, and, further, that the older Skakel siblings, along with Dowdle and Terrien, had been whisked away to Windham as soon as possible after the murder. Although the state's attorney did not, and could not, point to any direct evidence of a concerted effort by the defendant's father or other members of the Skakel family to orchestrate an alibi for the defendant, it was reasonable for the state's attorney to implore the jury to infer, on the basis of the circumstantial evidence, that such an effort had been undertaken on the defendant's behalf.

C

The defendant also contends that the state's attorney improperly asserted that the defendant's family believed that he

had killed the victim because, otherwise, he would not have been sent to the Elan School. The defendant further claims that the state's attorney improperly argued that the jury could infer from the evidence that the defendant's family had told Elan school administrators that the defendant had been involved in the victim's murder. We also reject these claims.

The following evidence is relevant to our review of this claim. As we have indicated, the state adduced testimony from several former Elan students regarding statements that the defendant had made while he resided at Elan. Two of those witnesses, Gregory Coleman and Dorothy Rogers, testified that the defendant had disclosed to them that he had been sent to Elan by his family to protect him from the authorities responsible for investigating the victim's murder. Several witnesses also testified that it was common at Elan for residents to be confronted either about issues that had precipitated their referral there or about problems they purportedly developed while in residence.[102] Alice Dunn testified that, at a general meeting that was conducted in response to the defendant's failed escape attempt, Joseph Ricci, the executive director at Elan, appeared to be reading from a "good sized" file when he confronted the defendant about the victim's murder. According to Dunn, during the course of this general meeting, Ricci's interrogation of the defendant included references to the golf club that had been used to kill the victim. Dunn further testified that Elan administrators usually obtained the information used to confront residents from institutions that the residents previously had attended or, with their parents' approval, from their therapists.

Detective Lunney testified that the Greenwich police department had played no role in the defendant's referral to

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[102] Among others, Sarah Petersen, Michael Wiggins and Donna Kavanah testified about the confrontational tactics employed at Elan.

Elan, and that the department never had communicated with Elan administrators about the victim's murder. Lunney further testified that, during the time period in which the defendant was enrolled at Elan, he was not considered a suspect in the murder.

Finally, evidence adduced at trial indicated that the defendant had told his father that he might have killed the victim. In particular, the defendant's father confided in his close friend, Mildred Ix, that the defendant had stated that he had been drinking on the night of the murder and that he might have been involved in the murder.

In his closing argument, the state's attorney outlined the reasons why the defendant had been sent to Elan, underscoring the evidence demonstrating that the defendant's family had sought to shield him from the police and that Elan administrators routinely confronted him with the victim's murder. The state's attorney asserted in relevant part: "One thing that I submit helps tie all this together, particularly on the subject of Elan ... is the defendant's very presence at that place. The defense scoffs at the idea despite I think such clear evidence of a cover up. Why was the defendant at Elan? This is really not a matter of seeing the forest from the trees. It is genuinely transparent.

"Clearly, the defendant had a major problem. Already he was an alcoholic, a substance abuser. Already he was beyond the control of his family. He was becoming suicidal. I doubt his family was even aware of the sexual turmoil he was going through. Elan was a last resort but why exactly so drastic a resort.

"You heard from Rogers and Coleman [that] he was being hidden from the police is probably part of it. It is likely, also, if it was a private juvenile justice system, basically, a family's response is what can we do to make sure this doesn't happen again. And where does that ring the truest?

At the horrible general meeting with the monster himself, Joe Ricci.

"One thing every client of Elan who was there during that particular era recalls vividly is Joe Ricci referring to a file and telling the defendant that he wasn't getting out of [the boxing] ring until he explained why he killed her, and then being forced to wear a sign, 'Confront me on the murder of my neighbor.'

"Where did Ricci get that information? Clearly, he didn't get it from the police. Why did Ricci have that information? Why did Ricci confront the defendant with that information? The answer, the only one that makes sense, lies in why the defendant was there in the first place, lies in why his family felt a need to put him in that awful place. Why? Because that's what they decided that they had to do with the killer living under their roof."

The defendant contends that this argument was improper because it was based on inadmissible hearsay, namely, statements about the defendant's involvement in the victim's murder that the defendant's family allegedly had made to Ricci and on inadmissible opinion evidence, namely, evidence that the defendant's family had sent him to Elan because they believed that he had murdered the victim. We are not persuaded by either of these contentions.

The assertion of the state's attorney that the defendant had been sent to Elan because of his apparent involvement in the victim's murder was not founded on inadmissible hearsay but, rather, on the testimony of Rogers and Coleman, both of whom testified that the defendant himself had explained that his family had enrolled him at Elan to shield him from the police. With respect to the defendant's challenge to the argument of the state's attorney that the defendant's family had informed Elan administrators of their concern that the defendant had been involved in the victim's murder, the focus of that argument was the likelihood that the defendant had dis-

closed his involvement in the murder to one or more members of his family. The inference that the state's attorney urged was founded on the evidence: several witnesses testified that it was common practice at Elan for students to be confronted by school administrators about events that had precipitated their enrollment at the school. On several occasions, Elan staff members had confronted the defendant regarding his involvement in the victim's murder. Furthermore, the defendant was not a suspect in the victim's death when he attended Elan, and the police had no contact with Elan officials while the defendant was a student there. Finally, the defendant had intimated to his father that he was involved in the victim's murder. In light of that evidence, the argument of the state's attorney as to what Elan administrators likely had learned from the defendant's family about the defendant's involvement in the victim's murder was not improper.

D

The defendant next claims that, during the state's attorney's closing argument, he improperly referred to the defendant as a "killer" and a "spoiled brat...." We conclude that the state's attorney's use of the term "killer," when placed in its proper context, was not improper. We also conclude that the state's attorney's reference to the defendant as a "spoiled brat," although arguably injudicious, manifestly did not violate the defendant's right to a fair trial.

In his closing argument, the state's attorney asserted that the defendant's family had sent the defendant to Elan "[b]ecause that's what they decided that they had to do with the killer living under their roof." When the word "killer" is considered in the fuller context of the argument in which it was used, it is clear that the state's attorney's use of that word was neither gratuitous nor inflammatory; rather, the state's attorney employed the term merely as a shorthand for

"the person who had killed the victim." When considered contextually, the challenged reference was benign.

On two occasions during his closing argument, the state's attorney described the defendant as a "spoiled brat...." On each such occasion, the state's attorney used the expression while underscoring the evidence that the defendant had told Coleman that he had killed the victim and that he was going to get away with it. In particular, in his initial closing argument, the state's attorney asserted that, "before any resident in Elan had an inkling of the defendant's having committed this murder, the spoiled brat smugly boasted, I can get away with anything and continued to describe to Coleman how he had beaten [the victim's] head in with a golf club...." Later, during rebuttal argument, the state's attorney made a similar assertion, again referring to the defendant as a "spoiled brat...."

The state argues that the state's attorney's use of the term "spoiled brat" was proper because it was based on the testimony of two Elan witnesses, one of whom testified that, while the defendant was a student at Elan, he had been forced to wear a large sign around his neck that stated, "Please confront me on why I am a spoiled brat," and another who testified that officials at Elan required the defendant to wear a large white poster board around his neck that stated, "I am a spoiled brat, please confront me on the murder of my friend, Martha Moxley...." The state further maintains that the state's attorney's reference to the defendant as a "spoiled brat" merely was intended to counter the suggestion, which defense counsel had raised during his cross-examination of Coleman, that, contrary to Coleman's testimony, the defendant would not have spoken in such an arrogant manner to Coleman because, at the time the defendant allegedly made his remarks to Coleman, Coleman was standing guard over him with a baseball bat. In essence, therefore, the state contends that the state's attorney's reference to the defendant as

a "spoiled brat" was not inappropriate because the reference reasonably was intended to explain the defendant's "smug bravado in confessing to Coleman."

Notwithstanding the evidentiary basis for the state's attorney's remarks and the justification advanced by the state for those comments, we believe that it would have been preferable for the state's attorney to have avoided using the moniker, "spoiled brat," in referring to the defendant. When the objectionable references are viewed in the broader context of the entire trial, however, it is apparent that they were isolated, relatively innocuous and not unduly prejudicial to the defendant. Because there is no likelihood that the challenged comments affected the fairness of the defendant's trial, his claim of a due process violation is clearly without merit.

E

We next consider the defendant's contention that the state's attorney improperly asserted that the defendant had masturbated on the victim's dead body. Specifically, the defendant claims that the state's attorney's remarks were improper because they were based, in part, on the untrustworthy testimony of Coleman. The defendant also contends that the state's attorney's remarks were improper because they were unsupported by the evidence. We disagree.

As we have explained, the state introduced into evidence the prior sworn testimony of Coleman. In that testimony, Coleman explained that the defendant had confessed to killing the victim and returning to her body two days later and masturbating on it. Coleman also testified in detail about his struggle with drug addiction and its effect on his memory. Coleman also acknowledged the discrepancy between his testimony that the defendant had admitted to returning to the victim's body two days after her death, and the fact that the victim's body was found the day after she was murdered. In his closing argument, the state's attorney argued that, after

killing the victim, the defendant then had masturbated on her dead body.

We disagree with the defendant's claim that the state's attorney's argument was improper because Coleman was not a credible witness. The defendant was free to argue, and he did argue, and the jury reasonably could conclude, in light of Coleman's long history of drug abuse, and the questionable nature of his recall with respect to the timing of crucial events, that Coleman's testimony was not credible. Indeed, Coleman's testimony that the defendant had admitted to returning to the victim's body two days after her death lacks credibility because the victim's body was discovered within a day of her killing. Nevertheless, a fact finder is free to credit one aspect of a witness' testimony and to discredit another portion thereof. *See, e.g., State v. Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony"). The fact that the jury could have concluded that some, or even all, of Coleman's testimony was unworthy of belief, however, did not render the state's attorney's reliance on that testimony improper.

The defendant further contends that the state's attorney improperly argued that two red marks found on the inside of the victim's right and left thighs tended to substantiate his contention that the defendant had masturbated on the victim. This claim also lacks merit.

Henry Lee, the criminalist, testified that two reddish marks discovered on the upper portion of the victim's inner thighs were consistent with bloody hands attempting to push the victim's legs apart. On the basis of this evidence, and in view of the defendant's statement to Coleman that the defendant had masturbated on the victim's dead body, the state's attorney urged the jury to conclude that the defendant had

masturbated on the victim's dead body after pushing her legs apart.

We agree with the state that Lee's testimony, coupled with the defendant's alleged statement to Coleman that he had masturbated on the victim's body, provided a sufficient factual basis for the state's attorney's argument. Although the inference urged by the state's attorney was far from inescapable, we do not judge the propriety of the state's attorney's argument by that standard; we ask, rather, whether the inference was reasonably supported by the evidence. The state's attorney's argument satisfies that test.

The argument also finds support in the fact that the defendant acknowledged to other witnesses that he had masturbated in a tree next to the victim's home. In fact, Pugh testified that the defendant had indicated that the tree under which the defendant masturbated was the same tree under which the victim's body was found. On the basis of this testimony, the state's attorney argued forcefully that the defendant belatedly had fabricated this version of the events to explain any future discovery of his semen on the victim's dead body. That argument, which, as we previously have concluded, is supported by the evidence, dovetails persuasively with the state's theory that the defendant had, in fact, masturbated on the victim's body after killing her.

Finally, the defendant contends that the state's argument was inconsistent with the fact that an autopsy of the victim failed to disclose the presence of semen. It is true that no semen was discovered during the victim's autopsy. Harold Wayne Carver II, the state's chief medical examiner, testified, however, that, although the pathologist who performed the victim's autopsy had failed to detect the presence of semen in the victim's pubic region, nothing in the autopsy report indicated that any attempt had been made to determine whether semen was present on other areas of the victim's body, including her buttocks. Because the autopsy did not

rule out the possibility of the existence of semen on those other parts of the victim's body, the state's attorney's argument underscoring that possibility was not improper.

F

Finally, the defendant challenges the propriety of the state's attorney's use of audiovisual evidence in its rebuttal argument. Specifically, the defendant asserts that the state manipulated the defendant's taperecorded comments about masturbating in a tree to make it seem as if he were confessing to murder. The defendant claims that the state did this by splicing together a "deceptively edited version" of his taperecorded interview and then using it as a voice-over to photographs of the murder scene. We disagree that the state's use of the audiovisual exhibits was improper.

At the close of the state's rebuttal argument, the state's attorney played for the jury, in three separate segments, approximately two minutes of the thirty-two minute taperecorded interview that the defendant had given to Richard Hoffman and which previously had been played for the jury in its entirety during the state's case-in-chief.[103] In each segment, the state displayed a transcript of the interview on a screen while the corresponding audio was amplified over a speaker. In the first segment, the following transcript was displayed while the corresponding audio was amplified: "[A]nyway, we got home and all the lights, most of the lights were out, and I went walking around the house. Nobody was on the porch, um, went upstairs to my sister's room. Her door was closed, um, and I remember that Andrea [Shakespeare] had gone home ...." After a short pause, the same text

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[103] When the tape-recorded interview initially was played for the jury, a corresponding transcript also was displayed on a screen so that the jury could read the transcript while listening to the tape.

appears on the screen again, only this time the last phrase, "and I remember that Andrea [Shakespeare] had gone home" appears in slightly larger font and in red letters, while the rest of the text appears in slightly smaller, black letters. Immediately following the first segment, the state's attorney argued to the jury in relevant part: "On supposedly getting home from [James Dowdle's house] he goes to his sister's room and remembers that [Shakespeare] had gone home. If you recall the credible testimony in this trial, the Monty Python tour, it already departed when Julie [Skakel] and [Shakespeare] had stepped out of the house to take [Shakespeare] home. Somebody who had actually left already would have had no idea of [Julie Skakel's] trip to take Andrea [Shakespeare] home. On the other hand, the 'Michael come back here' [figure], as he ran past Julie [Skakel] as she exited the house, would have been fully aware of this fact."[104]

The second segment displayed the following text while the corresponding audio of the defendant's voice was amplified over a speaker: "I said, 'Fuck this, [y]ou know why should I do this, you know, Martha likes me, I'll go, I'll go get a kiss from Martha.' 'I'll be bold tonight.' [Y]ou know booze gave me, made me, gave me courage again."

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[104] The state's attorney's reference to the "Michael come back here" figure is a reference to a statement that Julie Skakel had made on the evening of the victim's murder. Specifically, evidence adduced at trial indicated that, after Rushton Skakel, Jr., and Dowdle had departed from the Skakel residence to go to Dowdle's house, Julie Skakel, who had agreed to drive Shakespeare home, saw a person running across her front lawn and yelled, "Michael come back here." As reflected by his argument, the state's attorney claimed that Julie Skakel's statement provided support for the state's attorney's contention that the defendant had remained at the Skakel residence, and had not traveled with Rushton Skakel, Jr., and Dowdle to Dowdle's residence.

Finally, at the very end of his rebuttal argument, the state's attorney stated in regard to the interview conducted by Hoffman: "And then, the defendant does the most amazing thing .... He takes us on his staggering walk down memory lane. He first avoids the driveway oval where the club head was found and, more likely, [where] he first caught up with [the victim], given [Henry] Lee's testimony about blood in the driveway where the whole terrible thing started. Then he has himself under a street light throwing rocks and yelling into that circle with the exact same motion that had to have been [sic] used to beat [the victim] to death.

"Why this explanation. It's kind of obvious. As he explained to ... Hoffman, what if somebody saw me last night and then ...." At this point, the state's attorney stopped talking and the third segment of the Hoffman interview appeared on the screen while the corresponding audio was amplified over the speaker: "And then I woke up, went to sleep, then I woke up to [Dorothy] Moxley saying 'Michael, have ... you seen Martha?' " Just as the defendant finishes saying, " 'Michael, have ... you seen Martha,' " a photograph of the victim, smiling, appeared in the lower right hand corner of the screen beneath the written text. After a short pause, the following text appeared on the screen while the corresponding audio was amplified: "I'm like, 'What?' And I was like still high from the night before, a little drunk, then I was like 'What?' I was like 'Oh my God, did they see me last night?' And I'm like, 'I don't know,' I'm like, and I remember just having a feeling of panic." At this point, a photograph, previously introduced into evidence, depicting the victim's body lying under the pine tree, appeared in the lower right-hand corner of the screen, to the side of the written text. After a few seconds, the photograph disappeared and the following text appeared while the corresponding audio was amplified: "Like 'Oh shit.' You know. Like my worry of what I went to bed with, like may ... I don't know, you know what I mean. I just had, I had a feeling of panic." Another photo-

graph, which also had been introduced into evidence, depicting the victim's badly beaten body, then appeared in the lower right-hand corner of the screen, next to the written text. The state's attorney argued: "How could the sight of Dorothy Moxley possibly produce a feeling of panic in an innocent person, in a person who had gone to sleep knowing nothing of [the victim's] murder. The evidence tells you that only a person who had experienced that poor girl lying under the tree, not in his dreams but firsthand, would have a cause to panic on awakening that morning."

As we previously have stated, "counsel is entitled to considerable leeway in deciding how best to highlight or to underscore the facts, and the reasonable inferences to be drawn therefrom, for which there is adequate support in the record. We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. Indeed, to our knowledge, no court has erected a per se bar to the use of visual aids by counsel during closing arguments. On the contrary, the use of such aids is a matter entrusted to the sound discretion of the trial court." *State v. Ancona*, *supra*, 270 Conn. at 598, 854 A.2d 718.

We conclude that it was not improper for the state's attorney to play for the jury approximately two minutes of the defendant's tape-recorded interview with Hoffman and to display trial exhibit photographs of the victim while the tape was being played. Because the defendant does not contest the propriety of the state's use of the first two segments of the tape-recorded interview, we focus solely on the defendant's claims regarding the third segment. In particular, the defendant claims that the state's use of the third segment of the tape-recorded interview was improper because it omitted portions that contradicted the argument of the state's attor-

ney.[105] Specifically, the defendant argues that "[t]he omitted passage just before the excerpts highlighted by the state clearly indicates that the defendant was talking about his panic regarding masturbating in the tree, not about his involvement in the murder of [the victim]." The defendant contends that, by not playing the earlier portions of the tape and by displaying two gruesome photographs of the murder scene while the jury listened to the defendant express his fear that he may have been seen in the victim's yard on the night of the murder, the state conveyed to the jury the unfair impression that the defendant's panic was due to the fact that he had murdered the victim, when, in reality, it was due to his fear that someone may have seen him masturbating in the tree on the Moxleys' property.

After viewing the audiovisual presentation, we are not persuaded that there is any reasonable likelihood that the

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[105] Specifically, the defendant claims that the state omitted a portion of the tape in which he discussed with Hoffman his fear that someone had seen him masturbating. The defendant claims that the following was the full text of his remarks to Hoffman: "And then I was like 'I'm running home,' I ran home, and I remember thinking 'Oh my God. I hope to God nobody saw me jerking off.' And I remember thinking before I went to bed that I was gonna tell Andy Pugh that I thought I saw somebody in there that night. And then I woke up, went to sleep, and then I woke up to [Dorothy] Moxley saying, 'Michael have, have you seen Martha?' I'm like, 'What?' And I was like still high from the night before, a little drunk, then I was like, 'What?' I was like 'Oh my God, did they see me last night?' And I'm like 'I don't know,' I'm like, and I remember just having a feeling of panic. Like 'Oh shit.' You know, like my worry of what I went to bed with, like may ... I don't know, you know what I mean ...." The defendant claims that when he stated "Oh my God, did they see me last night?" he was referring to whether they had seen him masturbating.

state's presentation confused the jury or prejudiced the defendant in any way. Contrary to the defendant's claim, the presentation itself was not deceptive. That presentation consisted of the written transcript of the interview with Hoffman, which the jury already had seen in its entirety, the corresponding audio and three unaltered photographs of the victim that had been entered into evidence, one of which depicted her alive and smiling and two of which had been taken at the scene of the crime. As we previously have noted, the three photographs were juxtaposed with the transcript of the defendant's statements to Hoffman describing his panic upon seeing the victim's mother on the morning after the victim's murder but before her body had been discovered. By juxtaposing the photographs of the victim with the defendant's statements, the state's attorney sought to convey to the jury in graphic form what the state believed was the real reason for the defendant's panic, that is, that he had killed the victim. The state's attorney's prefatory and follow-up remarks to the segment make this point unmistakably clear.[106] Accordingly, we reject the defendant's claim that the state's use of audiovisual aides during closing argument violated his right to a fair trial.[107]

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[106] We reject, moreover, the defendant's claim that the state "splic [ed] together a deceptively edited version of his [tape-recorded] interview with Hoffman" so as to omit critical portions of the defendant's comments indicating that the reason he woke up in a panic was that he feared that someone may have seen him masturbating the night before. Contrary to the defendant's claim, the segment of the interview that the state played for the jury, in which the defendant described to Hoffman his feelings of panic upon waking up the morning after the murder, was not altered or spliced in any way.

[107] We note, finally, that defense counsel raised no objection to the state's rebuttal presentation. Apparently, defense counsel did not believe

[Footnote continued on next page]

The judgment is affirmed.

[Footnote continued from previous page]

that the state's use of the audiovisual aides was misleading or otherwise inappropriate. Although that fact is by no means dispositive of the defendant's claim on appeal, as we have explained; see, e.g., *State v. Stevenson*, supra, 269 Conn. at 576, 849 A.2d 626; we nevertheless consider that fact in reviewing the merits of an unpreserved claim of prosecutorial misconduct.

In this opinion SULLIVAN, C.J., and VERTEFEUILLE and ZARELLA, Js., concurred.

KATZ, J., concurring.

I agree with the majority's well reasoned and thorough opinion concluding that the judgment of conviction of the defendant, Michael Skakel, for the 1975 murder of Martha Moxley must be affirmed. With respect to the threshold issue, however, of whether the defendant's prosecution was time barred, although I agree with the majority that it was not, I reach that conclusion by a different route. I would dispose of that issue on the basis of the statute of limitations in effect at the time of the 1975 murder, as did the trial court, consistent with our long-standing jurisprudential approach to construction of criminal statutes, and in response to the state's principal argument to this court, and, therefore, I would not reach the issue of whether the 1976 amendment to the statute of limitations had a retroactive effect. In my view, the crime of murder was not subject to the statute of limitations in effect in 1975, and, indeed, there never has been a limitations period on the prosecution of murder. Accordingly, I join in all but part II of the majority opinion.

As with any issue of statutory construction, I begin with the pertinent language of the statute itself. The statute of limitations in effect at the time of the murder, General Statutes (Rev. to 1975) § 54-193, provided in relevant part: "No person shall be prosecuted for ... any crime or misdemeanor of which the punishment is or may be imprisonment ... except within five years next after the offense has been committed...." The defendant was charged and convicted of the crime of murder under General Statutes (Rev. to 1975) § 53a-54a (c), which provided: "Murder is punishable as a

class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a."[1]

The defendant was not charged under the capital felony statute, General Statutes (Rev. to 1975) § 53a-54b, and, therefore, could have been sentenced only to a term of imprisonment and not sentenced to death. In accordance with that fact, the defendant makes the following arguments in support of his claim that the prosecution is time barred: (1) the plain language of the statute of limitations precludes his prosecution because the defendant was indicted for a class A felony, punishable by imprisonment, and not a capital felony; (2) in *State v. Paradise*, 189 Conn. 346, 353, 456 A.2d 305 (1983), this court implicitly recognized, under facts indistinguishable from this case, that the same statute of limitations barred the prosecution of the defendants in that case; (3) when the legislature amended the Penal Code in 1973 to reinstate the death penalty, it intended that only the most heinous murders--those designated as capital felonies--would not be subject to the statute of limitations; and (4) the legislature's intent to exclude only capital felony murders from the statute of limitations is consistent with the legislative history of the murder statutes because noncapital murders that formerly were labeled "second degree" murders were subject to a statute of limitations for 125 years--from 1846 to 1971.

As an initial matter, I reject out of hand the defendant's reliance on *State v. Paradise*, *supra*, 189 Conn. 346, 456 A.2d 305, and welcome the opportunity to correct a misimpression of the law that it suggests. In *Paradise*, the "sole issue" before the court was whether the 1976 amendment to § 54-193, which expressly permitted unlimited prosecution of any class A felony, not just a capital felony, was by its own

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[1] Unless expressly stated otherwise, all references in this concurring opinion to § 53a-54a and § 54-193 are to the 1975 revision.

terms retroactive so as to apply to a 1974 murder. *Id.*, at 347, 456 A.2d 305. The state had failed to assert that the pre-1976 version of § 54-193 did not apply to a class A felony murder, and, consequently, the *Paradise* court undoubtedly proceeded from the premise that the defendants' prosecution in that case was time barred under § 54-193 when addressing the state's claim that the 1976 amendment to that statute applied retroactively. As such, the *Paradise* court never considered the question at issue here, relying on the superficial reading of the statute of limitations conceded by the parties in that case.

Looking beyond a superficial reading of § 54-193, I disagree that the "plain language" of the statute of limitations compels the result suggested by the defendant. As the discussion that follows amply demonstrates, the "crime" to which the statute of limitations refers is the general crime of murder--a crime punishable *either* as a class A felony or as a capital felony. Accordingly, the crime of murder implicitly is excluded from the statute of limitations. *See State v. Ellis*, 197 Conn. 436, 441, 497 A.2d 974 (1985) (concluding that crimes that must or *may* be punished by death are excluded by necessary implication from statute of limitations), on appeal after remand sub nom. *State v. Paradise*, 213 Conn. 388, 567 A.2d 1221 (1990). My conclusion, however, rests not only on the language of the statute, but also on the well settled principle of statutory construction that the court does not construe a statute in a manner that runs counter to reason. *See* General Statutes § 1-2z (permitting resort to legislative history when plain meaning of statute yields absurd or unworkable result); *State v. Sandoval*, 263 Conn. 524, 553, 821 A.2d 247 (2003). The defendant's "plain language" construction would yield such a result because, contrary to the defendant's view, it would disturb a long-standing and consistent practice in this state of excluding murder from the statute of limitations. I begin, therefore, with the history of the statute of limitations and the murder statutory scheme evidencing this long-standing practice and then turn to the

amendments to this scheme immediately preceding and following 1975 to ascertain whether the legislature intended to depart radically from that practice by subjecting the prosecution of most murders to a five year statute of limitations.

It is undisputed that the crime of murder was excluded, by implication, from Connecticut's earliest statutes of limitations, beginning in 1672 until 1846.[2] *See State v. Ellis, supra*, 197 Conn. at 441-44, 497 A.2d 974. Throughout this period, murder was a capital offense. *Id.*, at 448-49, 497 A.2d 974. Although, in 1846, our legislature divided murder into first degree (capital) and second degree (noncapital) offenses; Public Acts 1846, c. 16; thereby permitting certain less heinous murders to be punished by imprisonment, our early case law indicates that the legislature did not intend by this change to alter the bedrock rule that murder is not sub-

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[2] Section 54-193, the statute of limitations at issue in this appeal, is for all intents and purposes the same as the 1821 statute of limitations, from which § 54-193 traces its origin. The 1821 statute of limitations provided in relevant part: "No person shall be indicted, informed against, complained of, or in any way prosecuted, before any court ... for any crime or misdemeanor, whereof the punishment is, or may be, imprisonment in new-gate prison, unless the indictment ... be made and exhibited within three years, next after the offence shall have been committed ...." General Statutes (1821 Rev.) tit. 59, § 11. The following limited changes were made to the statute of limitations from 1821 until 1976:(1) in 1827, "new-gate prison" was changed to "Connecticut State prison"; Public Acts 1827, c. 27, § 9, p. 166; (2) in 1850, a tolling provision was added for those who had fled the jurisdiction; Public Acts 1850, c. 56, p. 40; (3) in 1882, the three year statute of limitations for "state prison" offenses was changed to five years; Public Acts 1882, c. 15, p. 126; and (4) in 1969, the term "state prison" was changed to "Connecticut Correctional Institution, Somers." Public Acts 1969, No. 297.

ject to a statute of limitations.[3] *See State v. Dowd*, 19 Conn.

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[3] In *State v. Ellis*, *supra*, 197 Conn. at 455, 497 A.2d 974, this court reached a contrary conclusion, reasoning that, when the legislature divided murder into two degrees, it must have intended for second degree murder to become subject to the statute of limitations because that offense was punishable only by imprisonment. The entirety of the *Ellis* court's reasoning for the distinction was as follows: "The purpose of the 1846 [public] act is stated clearly in its preamble. According to that preamble, murder was divided into degrees because 'the several offenses which are included under the general denomination of murder differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment ....' Public Acts 1846, c. 16. We believe that the 1846 legislature effectively divided murder into separate crimes for purposes of the statute of limitations." *State v. Ellis*, *supra*, at 456, 497 A.2d 974.

This summary conclusion, which was merely dicta, must be rejected as unsound in the absence of any support beyond the legislature's general statement of purpose explaining its rationale for imposing a two tier punishment scheme. The *Ellis* court did not consider any of our early case law cited in our previous discussion in the text of this opinion, which strongly indicates a contrary conclusion. Indeed, other jurisdictions have concluded, when analyzing statutory schemes structured similarly to our two degree murder scheme, that this division was intended to affect merely the punishment imposed and not the limitations period for prosecuting the common-law crime of murder generally. *See People v. Haun*, 44 Cal. 96, 97-98 (1872) (making distinction between first and second degree murder as to seriousness of offense, but not as to statute of limitations); *State v. Brown*, 22 N.J. 405, 412, 126 A.2d 161 (1956) ("All this [common law or statutory history] reveals the essential quality of murder as a single offense, divided by the statute ... into degrees, first and second, for the purpose of punishment alone, according to the gravity and heinousness of the felonious act, the moral obliquity that determines the difference between express and implied malice.... These statutes have not

[Footnote continued on next page]

388, 392 (1849) ("It is apparent from [the 1846 public act], that it was not the design of the legislature to create any new offen[s]e; or [to] change the law applicable to murder, except so far as the punishment was concerned. The crime still remains, as it was at common law; and in the more aggravated cases, the person convicted is liable to the original punishment, while others, whose crimes are less aggravated, are punished with less severity."); *State v. Cross*, 72 Conn. 722, 729, 46 A. 148 (1900) ("The meaning of our statute defining murder in the first degree, as enacted in 1846, has not been changed by subsequent legislation. It does not define a new crime, nor in any way affect the definition of the crime of murder as it before existed; it simply sets forth the circumstances attending the crime which must determine the punishment of murder, whether it be death or imprisonment for life."); *State v. Rossi*, 132 Conn. 39, 43-44, 42 A.2d 354 (1945) ("[t]he [1846 public act] was not designed to create any new offense or change the law applicable to murder except as to the punishment"), overruled in part on other *grounds*, *State v. Tomassi*, 137 Conn. 113, 123, 75 A.2d 67

[Footnote continued from previous page]

altered the nature of murder at common law; they are concerned only with the character of the punishment; the degrees do not constitute separate and distinct crimes, but merely grades of the same offense. Murder in either of the statutory degrees is murder at common law." [Citations omitted.]); *State v. Short*, 131 N.J. 47, 56-57, 618 A.2d 316 (1993) (affirming reasoning of *Brown* and distinguishing between degrees of murder and manslaughter under statute of limitations); *State v. Vance*, 328 N.C. 613, 622-23, 403 S.E.2d 495 (1991) (The court noted that a 1893 act dividing murder into first and second degree offenses was made only for "purposes of assigning punishment; it does not define or redefine the crime of murder.... [T]he definition of that crime remains the same as it was at common law ...." [Citations omitted.]).

(1950); *see also State v. Jacowitz*, 128 Conn. 40, 44, 20 A.2d 470 (1941) ("Murder, at common law, is the unlawful killing of one human being by another with malice aforethought.... The Connecticut statute, Cum. Sup.1935, § 1685c, has not changed this definition but provides a more severe penalty where certain features such as premeditation are present."). Indeed, for twenty-four years after the 1846 amendment, until 1870, the state was not even required to specify the degree of the murder in the indictment; the jury made such a distinction after determining whether the defendant was guilty of the general common-law crime of murder. *See* General Statutes (1849 Rev.) tit. 6, c. 2, § 3 ("the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain in their verdict, whether it be murder in the first degree or second degree"); *State v. Hamlin*, 47 Conn. 95, 117 (1879) (noting that legislature changed law in 1870; Acts of 1870, c. 73; requiring that indictment specify degree of offense). Even then, the impetus for doing so apparently was to give notice to the defendant of whether the state alleged that the crime was premeditated. *See State v. Hamlin, supra*, at 117.

What implicitly had been understood under well established practice-- that there was no statute of limitations on the common-law crime of murder, irrespective of whether the defendant had been convicted of first or second degree murder--became manifest as a result of the legislature's enactment of the Penal Code in 1969. See Public Acts 1969, No. 828, § § 54, 55. Under the 1969 Penal Code, which was made effective in 1971, the legislature abolished the distinction between the two degrees of murder, providing a single, simplified definition of murder and conferring discretion on the jury or the court to decide in each case whether to impose the death penalty depending on the circumstances of the

crime.[4] See General Statutes (Rev. to 1972) § 53a-46 (b) (permitting jury or court to consider either death or imprisonment); General Statutes (Rev. to 1972) § 53a-54 (c) ("[m]urder is punishable as a class A felony unless the death penalty is imposed as provided by section 53a-46"). Thus, under the 1969 Penal Code, there clearly was no statute of limitations on murder. In other words, because *any* murder potentially could be punished by death, there was no statute of limitations on the prosecution of *all* murders under the 1969 Penal Code.

In 1973, however, the legislature repealed that scheme and enacted § 53a-54a,[5] pursuant to which the defendant in the present case was convicted, providing for punishment of murder *either* as a class A felony or, under specific circum-

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[4] Under the 1969 Penal Code, murder was defined simply as an intentional killing, thereby eliminating the distinction of premeditation and deliberation that previously had been required to differentiate first degree murder from second degree murder; however, the legislature added an affirmative defense of extreme emotional disturbance that could reduce the offense of murder to first degree manslaughter. See Public Acts 1969, No. 828, § § 54, 55; Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen.Stat. Ann. (West 1985) § 53a-54a, pp. 32-33. Notably, there is nothing in the extensive legislative history to the enactment of the 1969 Penal Code reflecting that the code would effectuate any change to the statute of limitations.

[5] Section 53a-54a was essentially identical to its predecessor, § 53a-54, except for the addition of the following italicized words: "Murder is punishable as a class A felony unless it *is a capital felony and* the death penalty is imposed as provided by section 53a-46a." General Statutes (Rev. to 1975) § 53a-54a (c). Felony murder, however, which previously had been encompassed within § 53a-54, was separated into its own section under Public Acts 1973, No. 73-137, § 2. *See* General Statutes (Rev. to 1975) § 53a-54c (felony murder provision).

stances, as a capital felony. See Public Acts 1973, No. 73-137, § 2 (P.A. 73-137); General Statutes (Rev. to 1975) § 53a-54a. Thus, the critical question is whether the legislature intended, when making these changes, to disturb the existing, long-standing statutory scheme under which murder was not subject to a statute of limitations. The context in which these changes took place and the legislative history of P.A. 73-137 strongly indicate that the legislature did not intend to distinguish between class A felony murder and capital felony murder for statute of limitations purposes.

The legislature's actions in 1973 to repeal and replace the existing murder scheme was necessitated by the 1972 decision of the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in which that court struck down as unconstitutional the broad, discretionary type of capital murder scheme that was in effect under our 1969 Penal Code. See *State v. Aillon*, 164 Conn. 661, 661-62, 295 A.2d 666 (1972). House Bill No. 8297 proposed to repeal that discretionary scheme and to adopt § 53a-54a, which deemed murder a class A felony unless it was a capital felony, and General Statutes § 53a-54b, which defined five specific circumstances under which murder constituted a capital felony.[6] Although the bill was

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[6] As originally enacted, the capital felony provision designated six offenses that were death penalty eligible, only one of which was not predicated on murder. See P.A. 73-137, § 3 ("[a] person is guilty of a capital felony who is convicted of any of the following: [1] Murder of a member of the state police department or of any local police department, a county detective, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 of the 1969 supplement to the general statutes, an official of the department of correction authorized by the commissioner of correction to make arrests in a correctional institution or facility, or of any fire-

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debated vigorously and extensively in the legislature, it is telling that, in 350 pages of transcribed floor debates and committee hearings, there is not a single reference to the statute of limitations. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1973 Sess., pp. 125-33, 144-86, 192-200; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1973 Sess., pp. 369- 77, 407-10, 417-28, 470-80, 484, 488-500, 510-13, 533-50, 556-60, 569-70, 576- 79, 593-96, 601-605; 16 H.R. Proc., Pt. 6, 1973 Sess., pp. 2932-3003; 16 S. Proc., Pt. 4, 1973 Sess., pp. 1861-1978. Instead, the predominant focus of the debate was on the contours of the capital felony provision and whether the proposed bill would pass constitutional muster.[7]

[Footnote continued from previous page]

man, as defined in subsection [10] of section 53a-3 of the 1971 noncumulative supplement to the general statutes, while such victim was acting within the scope of his duties; [2] murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; [3] murder committed by one who has previously been convicted of intentional murder or murder committed in the course of commission of a felony; [4] murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; [5] murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; [6] the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided such seller was not, at the time of such sale, a drug-dependent person").

[7] The following comments exemplify the focus of the discussion in this regard on House Bill No. 82-97. Representative James F. Bingham, the chairman of the judiciary committee in the House of Representatives, stated: "This bill was drafted very carefully to comply with the death

[Footnote continued on next page]

It simply runs counter to reason to conclude that the legislature intended to impose, *for the first time in the state's history*, a statute of limitations on all murders except those committed under the five limited circumstances constituting capital felonies--rendering all class A felony murders subject to a five year statute of limitations--without a discussion or any expression of opposition. *See Statewide Grievance Committee v. Rozbicki*, 211 Conn. 232, 244, 558 A.2d 986 (1989) ("[a] major change in legislative policy, we believe, would not have occurred without some sort of opposition or at least discussion in the legislature" [internal quotation marks omitted]). Indeed, the absence of opposition is espe-

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penalty decision ...." 16 H.R. Proc., *supra*, p. 2928. Senator Joseph I. Lieberman, after discussing the *Furman* decision at length, stated: "The Bill before us today has been devised I presume in the hope that changing the sentencing procedure by providing a mandatory death penalty for conviction of certain enumerated crimes and carefully defining the circumstances under which judges and juries must act before imposing death will result in legislation able to withstand the scrutiny of the United States Supreme Court." 16 S. Proc., *supra*, p. 1904. "I do not believe that the proposed legislation could withstand the constitutional test." *Id.*, p. 1908. Senator Romeo G. Petroni remarked in support of the bill: "In my judgment, the fullest due process we can find within the guidelines of *Furman* is clearly set forth in this bill." *Id.*, p. 1924. Senator George C. Guidera, the chairman of the judiciary committee in the Senate and a sponsor of the legislation, commented extensively about *Furman* and then remarked: "The mitigating and aggravating circumstances which are outlined in this Bill ... have received great thought not only by the Judiciary Committee in Connecticut but by the Judiciary Committee in Washington D.C. [and] I think will prove to make the Bill constitutional .... [It] will set a guideline for the jury so that there is no doubt as to how they should approach the subject of the sentence." *Id.*, p. 1870.

cially telling considering that the capital felony provision enacted in 1973 did not yet include the murder of a child; see Public Acts 1995, No. 95-16, § 4; or the murder of two or more persons or a murder committed in the course of a sexual assault. See Public Acts 1980, No. 80-335. We have recognized that, "[i]n the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language." (Internal quotation marks omitted.) *State v. Ellis*, *supra*, 197 Conn. at 459, 497 A.2d 974. In accordance with these principles, this court previously has recognized that legislative changes to punishments under the Penal Code may not necessarily reflect a legislative intent to affect the limitations period. *See State v. Golino*, 201 Conn. 435, 442-47, 518 A.2d 57 (1986) (concluding that literal reading of statute of limitations did not apply to murder, even though defendant could be sentenced only to imprisonment after death penalty held unconstitutional); *State v. Ellis*, *supra*, at 457, 497 A.2d 974 ("we fail to see how legislation specifically addressed to capital punishment, and only indirectly affecting the statute of limitations, is any better gauge of legislative intent").

The legislative history to § 53a-54a, therefore, indicates that the crime of "murder," a crime punishable either as a noncapital, class A felony or as a capital felony, was excluded from the statute of limitations. *See State v. Jones*, 234 Conn. 324, 364-65, 662 A.2d 1199 (1995) (*Borden, J.*, concurring in part and dissenting in part) (Agreeing with the majority "that capital felony is a form of the generic crime of murder, as is arson murder under General Statutes § 53a-54d, and indeed felony murder under General Statutes § 53a-54c. That conclusion is consistent with our pre-penal code legislation, under which the single crime of murder was divided into two degrees.... It also follows from the language and structure of our current homicide statutes, under which murder is defined by ... § 53a-54a, and pursuant to which '[m]urder is punishable as a class A felony in accordance

with subdivision [2] of section 53a-35a unless it is a capital felony or murder under section 53a-54d.'" [Citation omitted.]).

To the extent that any doubt lingered as to its intent in 1975 in that regard, the legislature made its intent manifest by clarifying the statute of limitations in a 1976 amendment, wherein for the first time it expressly, rather than implicitly, excluded class A and capital felonies from the statute's scope.[8] Public Acts 1976, No. 76-35, § 1, codified at General Statutes § 54-193(a) ("[t]here shall be no limitation of time within which a person may be prosecuted for a capital felony, a class A felony or a violation of section 53a-54d or 53a-169"); *see also State v. Golino*, *supra*, 201 Conn. at 445, 518 A.2d 57 (referring to amendment as clarifying); *State v. Ellis*, *supra*, 197 Conn. at 459-60, 497 A.2d 974 (same). Accordingly, to construe § 53a-54a as the defendant would have us do in the present case would create the anomaly that

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[8] Although the legislative history to the 1976 amendment is sparse, the few comments made on the proposed amendment indicate that the legislature intended to clarify, rather than substantively change, the statute of limitations. Senator David H. Neiditz, the sponsor of the amendment, Senate Bill No. 203, explained: "This bill clarifies the statute ... of limitations for a capital or a class A felony, that there is no statute of limitations on these offenses and it clears up the language in the statute which, up until now, is referred to for a crime for which someone may be sent to a specific institution. It was made necessary by the abolition of capital punishment and the reinstatement of capital punishment ...." 19 S. Proc., Pt. 1, 1976 Sess., p. 341. Senator George L. Gunther appeared before the judiciary committee to speak in favor of several pending bills, remarking: "The last [bill] is [Senate Bill No. 203] which is concerning the statute of limitations and Mr. Chairman, I'm happy to see a clarification of this part of the statute." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 1976 Sess., p. 163.

for a three year period out of the state's history since colonial times--from 1973 until 1976--the legislature subjected all murders except those five circumstances designated as capital felony murder to a statute of limitations. It is clear that such an irrational construction cannot stand.[9] *See State v. Burns*, 236 Conn. 18, 27, 670 A.2d 851 (1996) (rejecting construction creating irrational and unintended result); *State v. Tucker*, 219 Conn. 752, 758, 595 A.2d 832 (1991) (same). Accordingly, because I conclude that the defendant's prosecution is not time barred under the statute of limitations in effect at the time of the murder, I respectfully concur in all but part II of the majority opinion.

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[9] Notably, even under the defendant's construction of the statutory scheme, wherein he claims that second degree murder was subject to a statute of limitations, his position defies reason. It would require us to conclude that the legislature eliminated such a distinction in 1969, without comment, then four years later, in 1973, decided to subject almost all murders to a five year limitations period, even those that previously had been excluded from the statute of limitations as first degree murder, and then three years later, in 1976, amend the statute to exclude once again all murders from the statute of limitations.

APPENDIX B

SUPREME COURT
STATE OF CONNECTICUT

NO. S.C. 16844

STATE OF CONNECTICUT

v.

MICHAEL SKAKEL : MARCH 14, 2006

ORDER

THE MOTION OF THE DEFENDANT, FILED FEBRUARY 14, 2006, FOR RECONSIDERATION, TO REARGUE AND FOR RECONSIDERATION AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED **DENIED**.

BORDEN AND NORCOTT, JS., DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

/s/
DEPUTY CHIEF CLERK

NOTICE SENT: MARCH 14, 2006
SANTOS & SEELEY, P.C.
COWDERY, ECKER & MURPHY, L.L.C.

CHRISTOPHER J. MORANO, CHIEF STATE'S ATTORNEY
FAIRFIELD P[illegible] CONVICTION REMEDY UNIT
HON. JOHN F. KAVANEWSKY, JR.
CLERK, STAMFORD SUPERIOR COURT,
(CR000135792T)
REPORTER OF JUDICIAL DECISIONS

356/050366

APPENDIX C

1. U.S. Const. art. I, § 10 provides:

* * *

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

2. U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX D

1. Conn. Gen. Stat. § 54-193 (Rev. to 1975) provides:

* * *

LIMITATION OF PROSECUTIONS

Sec. 54-193. Limitation of prosecutions for various offenses. No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time.

* * *

2. Conn. Gen. Stat. §§ 53a-54a, 54b (Rev. to 1975) provides:

* * *

Sec. 53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification. (a) A person is guilty of murder, when with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 53a-46a.

Sec. 53a-54b. Capital felony defined. A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the state police department or of any local police department, a county detective, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, an official of the department of correction authorized by the commissioner of correction to make arrests in

a correctional institution or facility, or of any fireman, as defined in subsection (10) of section 53a-3, while such victim was acting within the scope of his duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided such seller was not, at the time of such sale, a drug-dependent person.

* * *

3. P.A. 76-35, §§ 1-2 (April 6, 1976) provides:

* * *

AN ACT CONCERNING THE LIMITATION OF PROSECUTIONS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 54-193 of the general statutes is repealed and the following is substituted in lieu thereof:

No person shall be prosecuted for [treason against this state, or for] any [crime or misdemeanor of] OFFENSE, EXCEPT A CAPITAL FELONY OR A CLASS A FELONY FOR which the punishment is or may be imprisonment [in the Connecticut Correctional Institution, Somers] IN EXCESS OF ONE YEAR, except within five years next after

the offense has been committed; nor shall any person be prosecuted for [the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers] ANY OTHER OFFENSE, EXCEPT A CAPITAL FELONY OR A CLASS A FELONY, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time. THERE SHALL BE NO LIMITATION OF TIME WITHIN WHICH A PERSON MAY BE PROSECUTED FOR A CAPITAL FELONY OR A CLASS A FELONY.

Section 2. This act shall take effect from its passage. Approved April 6, 1976.

* * *

4. Conn. Gen. Stat. § 54-193 (Rev. to 1977) provides:

* * *

LIMITATION OF PROSECUTIONS

Sec. 54-193. Limitation of prosecutions for various offenses. No person shall be prosecuted for any offense, except a capital felony or a class A felony for which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed; nor shall any person be prosecuted for any other offense, except a capital felony or a class A felony, but within one year next after the offense has been committed;

but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time. There shall be no limitation of time within which a person may be prosecuted for a capital felony or a class A felony.

* * *

APPENDIX E

SUPERIOR COURT
JUDICIAL DISTRICT OF NORWALK STAMFORD
AT STAMFORD
STATE OF CONNECTICUT

----------x

STATE OF CONNECTICUT,

Plaintiff,

vs. Case No. FST CR00-135792T

MICHAEL S. SKAKEL,

Defendant.

----------x

PROCEEDINGS BEFORE

THE HON. JOHN KAVANEWSKY

* * * *

May 8, 2002

[Page 24, lines 13 through 18]

[Testimony of Thomas Keegan]

Q. And, do you recall testifying on a prior occasion that it was common knowledge that the Skakel golf clubs were left about the property.

A. It was reported. It was not common knowledge. It was reported that golf clubs were left around the property.

* * * *

[Page 66, lines 6 through 15]

Q. In the course of your investigation, did anyone find golf balls on the property of the Skakel home?

A. Yes, they did.

Q. And, was that consistent with your finding that they used golf clubs on the lawn at the Skakel home?

A. I can only testify that golf balls were found.

Q. And, I think you have already testified that it was reported to you that golf clubs were left on the property as well?

A. That is correct.

* * * *

May 9, 2002

[Page 73, line 2 through Page 74, line 6]

[Testimony of Helen Ix Fitzpatrick]

Q. And, when you got home, what did you do?

A. I got on the phone.

Q. And, do you recall who you talked to on the phone?

A. Yes, I spoke -- I called Melissa Holland and Jackie Wettenhall.

Q. And, they were both teenage friends of yours at the time?

A. Yes.

Q. And, when you were on the phone, did you hear anything?

A. Yes.

Q. What did you hear?

A. I heard our dog barking.

Q. Did you have a fence or any kind of a containment to keep the dog in the yard?

A. No.

Q. And, how long was the dog barking?

A. A long time, probably, you know, 20 minutes, a half hour.

Q. Did you do anything with regard to the dog barking?

A. Yes.

Q. What did you do?

A. First I went to the door and I turned the lights on. I looked out and I actually -- he was barking so much and he was staying in one spot that I went down the driveway. And I tried to call him but he wouldn't come. And, then the housekeeper made me come in.

Q. And, where was the dog barking?

A. He was facing the Moxley property in the middle of the road.

* * * *

[Page 75, line 21 through Page 76, line 8]

Q. Did you give a statement to the police right after this occurred?

A. Yes, I did.

Q. And, do you remember what you told the police as regarding who was in the car at various times?

A. I think -- I don't exactly remember but I have read what I had given and also it would be normal that he probably would have gone with them because they all hung out together, John and, you know, it would have -- and Jimmy,

they were kind of a, you know, a group. So, but I don't know for sure exactly. I don't remember who was in the car.

Q. Would your memory have been better then than it is now?

A. Absolutely.

* * * *

[Page 81, lines 17 through 25]

Q. So, to the best of your recollection, who was in that car?

A. Probably Rush, Jimmy, Michael, maybe John.

Q. And, that's your best recollection at this point?

A. Yeah.

Q. You are pretty firm on that?

A. No.

Q. Why aren't you firm on that?

A. Because I am just not sure. I don't remember.

* * * *

[Page 83, lines 11 through 22]

BY MR. SHERMAN:

Q. Jeff was in the car; correct?

A. Jeff got out of the car. He didn't go anywhere except home.

Q. But, you saw him get out of the car?

A. I know he -- I don't remember seeing him get out of the car. I know he was not in the car when the car left.

Q. But, when the car left, Michael was in the car?

A. I think he was but, I mean, everyone is asking are you absolutely positive. I am not absolutely positive about anything.

* * * *

[Page 84, line 3 through Page 85, line 10]

Q. At one point that night the dog was barking very violently?

A. Yes.

Q. In fact, you used that word violently in terms of describing the way Zock was barking that night?

A. Yes.

Q. He didn't always bark like that; did he?

A. He always barked but not like that.

Q. There was really a difference?

A. Yes.

Q. Describe the difference?

A. I mean, he barked at everybody. He barked at everybody and he chased cars and he even barked at us. But, he would stop and we could call him over. And so in any event, that night he was just barking.

I went out and I called him and called him and he still wouldn't come. And he always came and he just kept – it was really agitated barking. He was like something I would never forget it.

Q. And, he was barking in a certain direction?

A. Yes.

Q. Did you later learn that he was basically barking in the direction of the site where Martha's body was found?

A. Yes.

Q. Did you then put it together yourself that maybe that is what he was barking at?

A. I thought it was a possibility, yeah.

Q. What time was he barking?

A. Between probably 9:40, 45 and 10:15.

Q. How do we know that? How do you remember that time?

A. Because I got home at exactly 9:30 because that was my curfew. And I got on the phone and it was shortly after I was on the phone.

* * * *

May 15, 2005

[Page 70, lines 3 through 16]

[Testimony of Rushton Skakel, Sr.]

CROSS EXAMINATION BY MR. SHERMAN:

Q. How many children do you have, Mr. Skakel?

A. Seven.

Q. Can you name them?

A. Six boys and a girl.

Q. Can you name them?

A. I wish you wouldn't ask me that.

Q. I don't mean to embarrass you, believe me.

A. I don't -- well, there is one girl called Julie and then there is Rush. There is Tom. There is John. There is Stephen. There is Michael -- how many have I given you?

Q. Six.

A. Tom.

* * * *

[Page 71, lines 5 through 17]

BY MR. SHERMAN:

Q. Mr. Skakel, I think we are all interested in knowing as to whether or not you have an accurate memory of all the things that occurred some 26 years ago. Do you?

MS. GILL: Objection, Your Honor. That's not germane to competency.

THE COURT: I will allow the question, overruled.

THE WITNESS: I would say no.

BY MR. SHERMAN:

Q. And, why is that?

A. Well, because I am 78 years old and my memory is not as good as it was back those years.

* * * *

[Page 80, line 23 through Page 81, line 24]

Q. Mr. Skakel, do you know who Georgeann Terrien is?

A. Do I know who what?

Q. Georgeann Terrien.

A. Yes.

Q. Is that your sister?

A. No, she would be -- she would be a close relative.

Q. Okay; and, do you know Jimmy Terrien?

A. Yes.

Q. Is he a nephew?

A. Yeah.

Q. Mr. Skakel, do you recall about two weeks after the death of Martha Moxley taking all of your children to the police station to give statements?

A. To do --

Q. To give statements to the police, do you recall taking all seven of your children to the police station?

A. That I don't remember.

Q. Mr. Skakel, do you have a friend, her name is Mildred Ix, better known as Cissy Ix?

A. Yes.

Q. Is she a close long time friend of yours?

A. Yes, next door neighbor.

Q. Is she someone you have known for a number of years?

A. Yes.

Q. Is she someone you consider a close friend and confidant?

A. Yes.

* * * *

[Page 82, lines 12 through 24]

Q. Did you on occasion talk to Mrs. Ix about concerns you may have had regarding your children?

A. No.

Q. Did you ever talk to her about problems they were having in school?

A. Not that I can remember.

Q. Do you recall a conversation in about 1981 specifically with regard to your concerns about your son, Michael?

A. No.

Q. Mr. Skakel, are you saying you don't recall or you didn't have a conversation of that nature?

A. I don't recall.

* * * *

[Page 87, line 20 through Page 88, line 6]

CROSS EXAMINATION BY MR. SHERMAN:

Q. Mr. Skakel, what happened on September 11 of last year in this country.

A. September 11?

MS. GILL: Objection, relevance, Your Honor.

THE WITNESS: Last year?

THE COURT: No, I am going to allow it. Yes, you can answer the question.

THE WITNESS: Would you --

BY MR. SHERMAN:

Q. What happened in this country on September 11 of last year?

A. I don't -- it was a very big incident but, you know, I don't remember the details.

* * * *

[Page 168, line 25 through Page 169, line 24]

[Testimony of Matthew Tucharoni]

CROSS EXAMINATION BY MR. SHERMAN:

Q. Mr. Tucharoni, when did you first come to the police about this?

A. I came two weeks ago, a couple of weeks ago.

Q. And, when did this happen?

A. It could have happened in the year of 1976, in the spring break, probably on a Monday because I worked alone, or it could have happened also in November of that year because it was cool but not cold cold. And it could have been in the spring but I can't say the exact date. But I know it was on a day that I worked alone.

Q. There was no one else there?

A. Not working at the shop, no.

Q. So, you must have told somebody like the next day, I assume?

A. Well, I worked Monday, usually got Tuesday off and my boss worked Tuesday through Saturday and I worked Monday, Wednesday through Saturday.

Q. So, you must have told your boss the next day?

A. No, I didn't tell anybody. I am sorry. I misunderstood you, I didn't say anything to anybody.

Q. Until April 18 of 2002?

A. 2002, I knew what was going on because I could read the paper, I knew what was involved.

Q. And, in the papers you saw a picture of Michael Skakel as he is today; correct?

A. I saw a picture of him, yeah.

* * * *

[Page 177, line 9 through Page 178, line 26]

Q. So, they were the only customers that you remember that day?

A. Yeah. I thought they all three were going to get a haircut but only one did.

Q. And, the day of the week it was, Monday?

A. I think it was Monday because I was all alone.

Q. Well, do you think or you are pretty sure?

A. I am pretty sure it was Monday. I usually work alone on Monday.

Q. Well, I know usually and I am not trying to put words in your mouth but can we kind of rely on that?

A. Well, I mean, it's a long time ago.

Q. Yeah.

A. And, I remember the words because I thought about it for awhile, let's see, this is terrible, what am I doing to do, you know, I am here all alone, thinking to myself and reciting what he has said and then thinking back and that's what he had said. And --

Q. And, then you finally told Paul Verili (ph) about it; right?

A. Yes.

Q. Who is Paul Verili?

A. Paul Verili is a client of mine. I have been doing him for a long time, used to do his wife's hair too and they are divorced now. And he is a sheriff from Stamford.

Q. He is a sheriff; right?

A. Yeah, he is a sheriff.

Q. You finally mentioned this to him a couple of weeks ago, maybe?

A. Yes, about two weeks ago.

Q. And he is the one that said, wow, holy cow, that's the Skakel case, you have to go to the authorities, right?

A. Something like that. Yeah, he said I want you to go and he gave me the name and number to call and I did. And then they finally put me through the right connection. And then Paul called me back and he said, did you call. He called me the next day because he wanted me to do this.

Q. In fact, did he call the authorities?

A. I am sorry?

Q. Did he call the authorities?

A. No, he called me back the next day to see if I had called them.

* * * *

[Page 199, line 17 through Page 200, line 1]

Q. Either of these lawyers never told you you should immediately go to the state attorney's office?

A. No.

Q. The only person that ever suggested you do that was a few weeks ago when one of the sheriffs, Mr. Verili, heard you tell the store and said you have to go to the state attorney's office?

A. No, I was cutting his hair and I told him the story and he said, I should call in.

Q. Okay.

A. And, he said I will call you tomorrow to see if you have followed through and he did.

* * * *

[Page 200, lines 8 through 22]

Q. Why did you bring it up while he was getting his hair cut?

A. Because it is really in the paper and everybody is talking about it.

Q. And, that's why you brought it up?

A. Well, I knew he was a person of authority, some authority, sheriff.

Q. But, I mean, you could always call 911 if you wanted to get to a policemen; correct?

A. I have known this sheriff for a long time.

Q. Right.

A. And, we never talked about this, this is the only time it was brought up.

Q. And, you brought it up because it is in the news?

A. Yeah, with general conversation.

* * * *

May 16, 2002

[Page 193, lines 7 through 24]

[Testimony of John Higgins]

Q. Did you call Inspector Garr and tell him you know something about this case?

A. No, I did not.

Q. Did you ever call anybody to tell them that you know something about this case?

A. Yes, I did.

Q. Who?

A. I think I called A Current Affair or America's Most Wanted or one of those shows one time.

Q. And, why did you do that?

A. It was convenient. I saw it on the screen and I called them up.

Q. Did you leave your name?

A. No.

Q. Did they get back in touch with you?

A. No, I hung up on them.

Q. After that, did anyone get ahold of you?

A. Eventually Frank Garr got ahold of me, yes.

* * * *

[Page 220, line 3 through Page 222, line 26]

Q. Okay; so, I am right that you did have the responsibility of taking notes about important things and putting them in that box?

A. I had many responsibilities there.

Q. Well, was that one of them?

A. That I probably, it was probably my obligation to say something about that, yeah.

Q. That's my question.

A. Oh.

Q. And, I appreciate your candor. So, the next question is, you didn't say anything; did you?

A. That is correct.

Q. You didn't say anything then, you didn't say anything later and the only time you said anything was how many years later?

A. I don't know, how many years, 20, 15, I don't know.

Q. And, you only said it after Harry Kranick read in People magazine that there was a reward or something; right?

A. No, I mean, I had occasionally talked about it, Chuck Seigan knew about it.

Q. When did you tell Chuck Seigan?

A. I can't, I can't really recall exactly when.

Q. Do you remember how you told Chuck Seigan. Did you call him, I mean --

A. No, he was going, I think he was going into business with Harry at the time and that's when I was reintroduced to him from Elan which was 15 years later after I left Elan or so. And we had obviously had discussions of Elan while we were being reacquainted so I would assume but I can't be certain that that's when we talked about it.

Q. But, this happened, you think, in '78 or '79; correct?

A. '78 through '80, yes.

Q. And, you didn't mention it to anybody other than Chuck Seigan until Harry Kranick calls you and says he read in People magazine that there is a $50,000.00 reward. Am I right about that?

A. Would you ask that one more time, please?

Q. Sure. This happened in 1978, 1979, am I right, and you didn't say anything until about 20 years later when Harry Kranick tells you that he read in People magazine that there is a $50,000.00 reward?

A. No, that is not correct.

Q. When is the first time, other than telling Chuck Seigan, when is the first time you told anybody else about it?

A. I told Harry that morning or the next day in 1978 through '80.

Q. And then after that?

A. And then I probably discussed it with Harry and Chuck eventually.

Q. Right. Other than Harry and Chuck, you didn't say anything to anybody, you kind of hung in there until Harry calls you to tell you that, hey, People magazine is saying that there is a $50,000.00 reward?

MR. MORANO: Well, I am going to object. That's a mischaracterization of his testimony.

THE COURT: Let's rephrase, hung in there.

BY MR.SHERMAN:

Q. Did Harry Kranick ever call you to tell you that there is a $50,000.00 reward that he read about in People magazine?

A. Yes, he did.

Q. When was that?

A. Maybe six years ago, eight years ago or something like that, I don't know.

Q. And, when you spoke to Inspector Garr, did you speak about the reward with him?

A. Yes, I did.

Q. Did he tell you about the reward?

A. No. Actually, I said, Harry called me and told me there was a reward and it was $50,000.00.

Q. And, do you remember Inspector Garr telling you, well, it's up to $100,000.00?

A. That is correct.

* * * *

May 17, 2002

[Page 90, lines 7 through 17]

[Testimony of Alice Dunn]

BY MR. SHERMAN:

Q. And, what was the topic of that group session with Michael Skakel wherein Greg Coleman was present?

A. I remember a primal scream therapy session that we had and the topic of it was Michael's mom's death.

Q. And, the topic was -- specifically, what were you talking about in regards to Michael's mother's death?

A. Just the sadness that was there, obviously, and, you know, have him try and get in touch with that so that he could talk about it and maybe get to a better place with it.

* * * *

[Page 137, lines 1 through 7]

[Testimony of Gregory Coleman]

A. I made the comment to Mr. Skakel, boy, this guy can get away with murder. And he said, I am going to get away with murder because I am a Kennedy and went into telling me -- I asked him what are you talking about. And he went into telling me how he had made advances to this girl where he lives and that she spurned his advances and that he drove her skull in with a golf club.

* * * *

[Page 139, line 16 through Page 140, line 4]

Q. In the course of your stay at Elan, you had continued contact with Mr. Skakel?

A. Yes, I did.

Q. Do you recall the subject of his involvement in a murder in Connecticut coming up on any other occasions you were present at?

A. Yes, I do.

Q. Would you describe that?

A. The occasion was a primal scream therapy session where he was talking about his guilt, about this situation and he was told to repeat the words in a yelling fashion until he got in touch with his feelings of I am sorry.

Q. To repeat what words?

A. I am sorry.

Q. Did he do that?

A. Yes, he did.

* * * *

[Page 145, line 20 through Page 147, line 13]

Q. Do you remember me asking you, not the Grand Jury, but me asking you, Michael Skakel told you he killed her with a driver?

A. Yes.

Q. What did you say?

A. That's my recall, yeah.

Q. In fact, didn't you say, as I said before, that is what I heard, that's when I recall and that's when I am sticking to?

A. Yes, I did.

Q. And that refers to him using a driver?

A. Yes.

Q. To kill her?

A. Yes.

Q. And, he said that?

A. Yes.

Q. So, back then, you were only talking a few months ago, you said that's what I heard, that's what I recall and that's what I am sticking to?

A. Yes.

Q. But, now we are not going with that story anymore; right?

A. I believe he said it was a driver, yes.

Q. Okay, so that's a little bit different than what Mr. Benedict just got out of you; right?

A. I guess so.

Q. Okay; here is the problem. You told the Grand Jury it was a driver. You told us a few months ago it was a driver. You told us that is your story, you're sticking to it. But then a few minutes ago, you said to Mr. Benedict, to his question, well, it was my impression that it was a driver because he drove and that's what you use when you drive, you use a one wood. Where did that story come from?

A. What story is that?

Q. The thing that well, you figured out it must be a driver because --

A. It was always my impression. I said that because of the comment that he drove her skull in with a gold club, I had the impression it was a driver.

Q. But, you said he said it was a driver. You didn't ever say to the Grand Jury and you never said to us in this Courthouse that it was your impression. You said, as I said before, that's what I heard, that's what I recall and I'm sticking to it.

A. That is correct.

Q. And, you couldn't be more positive of that?

A. That is correct.

* * * *

[Page 148, line 22 through Page 150, line 14]

Q. So, your recollection today is, I am kind of lost at this point, is what? Did you say it was a driver or now it is your impression it was a driver? Which story are we going with today? Take your time.

A. It was my impression it was a driver.

Q. What did he tell you?

A. He said he drove her skull in. He drove her skull in with a golf club.

Q. He never said driver?

A. No.

Q. So, when you spoke to the Grand Jury, you lied?

A. No.

Q. You didn't?

A. No.

Q. How do we account for that, then? You swore under oath he said it was a driver?

A. Lapse of memory.

Q. Lapse of memory. When you testified here under oath a few months ago, you said, that's my story, and I am sticking to it, that's what I recall. That was no lie either; right?

A. I don't believe so. I believe that was my recollection at the time.

Q. How do we account for the fact that your recollection changes?

A. I don't know.

Q. Would you agree that your recollection does seem to change?

A. As far as my impression of what golf club it was, yeah.

Q. That's not the question, Mr. Coleman.

A. I would have to say sitting here, yes.

Q. As a matter of fact, yes, that your recollection does change?

A. It did change, yes.

Q. In fact, do you recall me asking you the same kind of questions at the close of your testimony a few months ago and I asked you whether or not, are you making any mistakes now on this thing, on this testimony. And do you remember what you said? And I will show you this to refresh your recollection. I asked you, are you making any mistakes now in this thing and you said what?

A. I would say my recall at times would be questionable.

Q. You probably agree with that today too; don't you?

A. Yes.

* * * *

[Page 153, line 4 through 155, line 11]

Q. Let's take a look at something. Do you remember when you went before the Grand Jury and took an oath and swore to the Judge at that point, Judge Thinn (ph), someone asked you, did he talk to you one time or more than one time. Do you remember what your answer was? Please feel free to refresh your recollection.

A. More than one time.

Q. Actually, you said a little more than that, right? Do you remember telling the Grand Jury, from that point on, he talked to me and he talked to -- he talked about it in groups, he talked about it at dinner, it didn't seem that Michael Skakel had much problem keeping hidden the fact that he had killed this girl, that my understanding was that nothing was going to happen to him and that the reason that he was there was so that no one could question him, no one could find out where he was and to hide him. And that was pretty much it. In other words, he confessed to everyone there. Is that what you told him?

A. Yes, I believe I made a comment it was common knowledge at Elan, but I also believe I was asked the last time and I said if I had to say it, I would say twice.

Q. Yeah, but that was the last time. How about when you testified in front of a Grand Jury which resulted in his being placed under arrest?

A. Um-uh.

Q. At this point, you didn't say twice, right, you said he talked about it?

A. That's what I said. That's what I said.

Q. And, you said that he talked about it in groups, he talked about it at dinner. It sounded like -- it sounds like you couldn't shut him up. Do you remember, did you ever give a number of times that he confessed?

A. Not until the last time, I don't believe.

Q. Remember the prosecutor saying to you, okay, now, how many times do you personally recall talking about the murder?

A. Yes.

Q. All right.

A. Yes.

Q. And, do you recall what you said?

A. Yes.

Q. What did you say?

A Five or six times.

Q. You said personally one to one?

A. Um-uh.

Q. One to one?

A. Um-uh.

Q. Not groups?

A. Um-uh.

Q. One to one, I would say I talked to him one to one?

A. Um-uh.

Q. Probably five or six times about the murder?

A. Um-uh, yes, I did.

Q. Why did you say that?

A. That was my recollection at the time.

Q. That certainly is not your recollection now?

A. No.

Q. Which recollection do you think is the better one?

A. This one now.

* * * *

[Page 160, line 24 through Page 163, line 9]

Q. Did you ever know that his brother was a suspect too?

A. Yes.

Q. Did he ever talk about that?

A. No.

Q. How did you find that out? When did you know that his brother was a suspect?

A. Two years ago.

Q. Before that, you didn't know?

A. No.

Q. You told the Grand Jury that you didn't even know about it until many, many years later; correct?

A. Yes, about two years ago.

Q. And, you swore to that in front of the Grand Jury; right?

A. I believe so, yes.

Q. You never knew about it?

A. Right.

Q. But, then, when you spoke to the Grand Jury and you were talking about the confession that night, didn't you say, and then it came out that he was up there basically to stay away from Connecticut because they were investigating his brother?

A. Yeah, it came out on TV.

Q. Oh, really, that was on the TV show?

A. Yeah.

Q. The question before I asked you that was, do you recall ever having conversations with Michael Skakel about his involvement in the murder of a young girl in Connecticut. Do you remember them asking you that?

A. If it is there, they asked me.

Q. Do you remember them asking you that? Does this refresh your recollection that they in fact asked you that?

A. Yes.

Q. And, do you remember telling Mr. Benedict who asked you these questions that, excuse me. the first time, like I said, I didn't deal with Michael Skakel. The first time I had to deal with him to where we were talking, I had been assigned to oversee him. Is that true?

A. Um-uh.

Q. About two in the morning, we were in the mess hall. Part of the facility and he, um, you know, we got talking about what are you in for, why are you here, who your family is and whatnot. Is that correct?

A. Yes.

Q. And, he made it known, it seemed like from that point on, he was making it known more or that he was related to the Kennedy family; right?

A. Um-uh.

Q. And, then your response, and then it came out that he was up there basically to stay away from Connecticut because they were investigating his brother, I believe, for the murder of this girl?

A. Um-uh.

Q. When you say it came out, now, you just said it came out because of the TV; right?

A. Um-uh.

Q. But, that's not what you said here; is it?

A. That is correct.

Q. In fact, you told the Grand Jury this is something he told me?

A. Correct.

Q. So, you swore before the Grand Jury and said that he was up there because they were investigating his brother; right?

A. That's what it says. That's what I said.

* * * *

[Page 166, lines 11 through 24]

Q. I will buy that. At some point, you were having problems with your wife. You were in a hotel and you watched the MS NBC show; right?

A. Yes.

Q. And, you at that point realized that it is really Michael Skakel. It is then that you do something about it, the second show?

A. No.

Q. No?

A. Yes.

Q. And, who did you call?

A. NBC.

Q. The NBC affiliate in Rochester?

A. Yes.

* * * *

[Page 172, line 11 Through Page 176, line 17]

Q. I don't know that I ever got to ask you whether or not, when you testified here in this building at the reasonable cause hearing, what were you on at that time?

A. Nothing.

Q. You would come here from prison?

A. Yes.

Q. And, were you unable to get drugs in prison?

A. No, you can get drugs.

Q. But, you didn't partake of any drugs before you came here?

A. No.

Q. Yesterday, were you on drugs?

A. No.

Q. Nothing?

A. Nothing, absolutely nothing.

Q. Was that a problem?

A. That was a big problem.

Q. What happened after you left here yesterday?

A. I had to go to a hospital because I take methadone. And I came to Connecticut with no methadone, no heroin, nothing that my system needs. And I had to go to a hospital and get methadone.

Q. Did you check out of the hotel?

A. No, the hotel checked me out because they saw me leaving with my bag yesterday morning when I -- when the detectives picked me up.

Q. Why did you leave with your bags yesterday. This is after you testified?

A. No, this is before I testified.

Q. Did you check out of the hotel because you were done here or no?

A. No, I anticipated that I might get finished and might be able to get a flight out of here yesterday afternoon.

Q. Okay; but, then you had to check back in the hotel?

A. Correct.

Q. Was that with the assistance of the state attorney's office?

A. For some reason, when I went back to the hotel yesterday, I was checked out. I don't know why. I don't know who initiated that but I did have to be rechecked in and the room is not in my name. I mean, it is in my name but I didn't pay for it. So, yes, I did have to have assistance.

Q. And, did they assist you in bringing you to the hospital?

A. Of course.

Q. And, how were you feeling when you went to the hospital? Were you able to express yourself properly and everything, were you throwing up, what was your state?

A. I was very irritable. I was very anxious. I had a lot of the physical symptoms of withdrawal from opiate dependence. I wasn't feeling good at all yesterday as people might have been able to tell.

Q. But, you were honest with us about having taken drugs?

A. Of course.

Q. In fact, if there is anything that you had been most honest about, it is about your drug problem?

A. Of course.

Q. And, you did take drugs when you testified at the Grand Jury?

A. Yes, I did.

Q. You did take drugs when you told the station in Rochester that Michael Skakel confessed?

A. I did.

Q. And, the last time you took heroin before yesterday was when?

The last time before you testified yesterday, when was the last time you took heroin?

A. I had to remember this because there was a lapse. When they had me on the methadone and they took me off the methadone for a couple of days, I believe it was Monday.

Q. Okay; and today is?

A. Thursday.

Q. So, you took heroin on Monday?

A. Um-uh.

Q. And, then you testified on Wednesday?

A. Yeah.

Q. How much heroin did you take?

A. I injected one bag of heroin.

Q. Using a needle?

A. Yes.

Q. And, where was that? Where did you do that, here or in --

A. Rochester.

Q. And, before that, when was the last time you took heroin?

A. The following Thursday.

Q. When you came here to testify, were you feeling the effects of the heroin?

A. Oh, no, definitely not.

Q. In fact, that was the problem, that the heroin had worn off?

A. Yes, that's the problem.

Q. And, were you going through withdrawal?

A. Yes.

Q. And, that's why these folks helped you by taking you to the hospital so you could get some methadone?

A. Correct, I am supposed to be on methadone, prescribed dose of methadone anyways.

Q. Does the withdrawal process effect your memory or your ability to recollect events?

A. It effects my ability to focus as far as I would rather be anywhere but where I am and so my physical symptoms are subsided like with my clock watching yesterday.

Q. With your what?

A. With my clock watching yesterday.

Q. I was watching the clock too.

A. Well, so was I but --

Q. All right; you are feeling okay now?

A. Very good.

* * * *

[Page 180, line 17 through Page 181, line 26]

Q. No one ever asked him in the primal scream session if he was guilty; did they?

A. No. They asked him if he was guilty. He was supposed to get in touch with his guilt feelings about this. I don't know the dynamics of a primal scream therapy session because I am not a psychiatrist.

Q. Yeah, but, you were there when it happened?

A. Correct.

Q. Describe how it helped Michael Skakel get in touch with his feelings?

A. The gist of it is repeatedly, you know, saying this at a screaming level is supposed to get you in touch with the emotions of it to where you break down. Basically that was the whole idea with this primal scream group was that they wanted you to break down and if you broke down, then obviously you were in touch with this. I mean, of course, they could be faked or whatever else but specifically he was told to say repeatedly I am sorry with regard to this issue of the murder of Martha Moxley.

Q. Well, he didn't scream that he admitted that he killed Martha Moxley; did he?

A. I have already said no.

Q. In fact, you have said that in previous testimony?

A. If it is there.

Q. How many people were screaming at him to say I am sorry?

A. There was no one screaming at him.

Q. I thought that people were supposed to scream at him?

A. No, there was a group leader which I believe was Alice Dunn where you get into a, you know, six to eight person group. And they have a person picked who they are going to work with before the group is even started. And they start off by confronting the person and then the person who is running the group decides what, you know, they are going to have them work on for that session.

* * * *

[Page 195, line 6 through Page 196, line 16]

Q. What job did you have then?

A. I was what was called a night owl.

Q. And, does a night owl have any responsibility to keep records?

A. Like I said, depends if you are given the job to watch the dorm or I was given a specific job to personally oversee Michael Skakel.

Q. Is that the job you had?

A. Yes.

Q. And, was it part of your job to take notes?

A. No.

Q. So, no matter what Michael Skakel said to you, you didn't have to take a note about it?

A. Oh, no.

Q. I thought they kept meticulous records?

A. They do as far as haircuts that were given, verbal reprimands, spankings, general meetings, haircuts, anything.

Q. The important stuff?

A. I guess.

Q. Not murder confessions?

A. No. My job with Michael Skakel was to personally oversee him. As far as what Michael Skakel talked to me about, I did not have to report it. I did not have to write it down. I did not have to do anything with it.

Q. So, who did you tell it to?

A. I didn't. I don't believe I told anybody.

Q. Well, you must have told Mr. Ricci, the owner of the program?

A. I never discussed anything with Mr. Ricci about this incident.

Q. Dr. Davidson?

A. Never, I don't think I ever saw Dr. Davidson when I was at Elan but one time.

Q. So, you heard the murder confession but didn't tell anyone?

A. No, not really.

Q. How come?

A. I just didn't.

* * * *

[Page 199, lines 11 through 19]

A. No, I believe I said I watched the MS NBC show that I saw Mrs. Moxley on there and, you know, the way she looked was that she needed some closure to this. And I felt I could contribute something to possibly her getting some justice.

Q. So, what did you do?

A. I called -- well, first I called MS NBC. I couldn't get in touch with anybody so I called NBC in Rochester.

* * * *

[Page 208, line 1 through Page 212, line 25]

Q. If I may have a moment, Your Honor, the initial question here and I am not going to belabor it was when you met -- was when you met Michael Skakel, did you know about this murder, did you know that he was allegedly involved in a murder? Yes or no?

A. I believed there was probably some debate as to what I recall. But right now I would have to say when I was assigned to watch him on the stage, I did not know what he was in Elan for.

Q. You didn't?

A. I didn't, sitting here right now.

Q. Isn't that a little bit different than what you just said?

A. I knew you were going to say that.

Q. It's what I get paid for.

A. I am sure you got it on some page that I probably--

Q. I sure do.

A. That probably says something different.

Q. Reasonable cause hearing, do you remember what you told Judge Dennis and the rest of us who were here as to whether or not you knew about this murder when you met Michael Skakel? When you were guarding him, did you know that there was the murder of Martha Moxley and that he was allegedly involved, reasonable cause hearing, June, Stamford?

A. I don't recall.

Q. Does this refresh your recollection? I am sorry, page 173.

A. Um-uh.

Q. And, what is your recollection? What did you tell us back then?

A. No.

Q. So, when Mr. Benedict or somebody asked you at the time you were given this assignment of guarding him up on the stage, you did not up to that point have any knowledge from anybody of his involvement in any homicide, murder or any crime; right? They asked you for that?

A. Yeah.

Q. And, your answer was?

A. No, sir.

Q. Yet, page 29 of the Grand Jury is sometime before that and page 30, do you remember what you told the Grand Jury, same issue, when you were guarding Michael Skakel, did you know about his alleged involvement in the murder? Look here and I ask you whether this refreshes your recollection?

A. Am I supposed to answer this?

Q. Go from here to here.

A. Yes, I remember this. Yeah, I remember it.

Q. So, before the Grand Jury, when you were asked the same question, whether or not you knew that Michael Skakel was allegedly involved in a murder, when you were assigned to guard him, what was your answer then?

A. That it wasn't a very well hidden fact that he was there for killing Martha Moxley.

Q. You said he was there because he killed this girl?

A. Yeah.

Q. Right?

A. Yeah and it wasn't a very well hidden fact.

Q. Everyone knew of it?

A. Yeah.

Q. I think you told us yesterday, Michael Skakel would talk about it at dinner and talk about it everywhere?

A. I think I took that back yesterday.

Q. Did you take that back yesterday?

A. I don't know.

Q. I have to check.

A. You have probably got it noted there somewhere.

Q. Yeah, I have take back notes. So, you agree that you gave one story to the Grand Jury and then the opposite story at the reasonable cause hearing?

A. I believe there last been indication, yes.

Q. I am sorry?

A. I believe there has been indication that I have done that.

Q. As you sit here today, when you were assigned to guard Michael Skakel that night, did you know about the murder or did you not know about the murder? Are we going with the reasonable cause version or the Grand Jury version?

A. I can only sit here and tell you what I remember Michael Skakel saying to me.

Q. Right. I am not asking that. I am asking whether or not you knew about it, not -- and it's not necessarily from him?

A. I don't believe so.

Q. You didn't know?

A. I don't think so.

Q. So, when he confessed this murder to you, you didn't even know about the murder?

A. Correct.

Q. And, you didn't even know why he was there?

A. Correct.

Q. Right?

A. Correct.

Q. But, you assumed he was there to beat some charge like you were and a lot of people were?

A. I believe he was there to save face from his family like most every kid there was which usually involves some crime or some type of embarrassment.

Q. But, you didn't know what the crime was?

A. No, definitely.

Q. Now, it is definitely?

A. I didn't know what he was -- I didn't know what he was in Elan for specifically, no.

Q. But, I mean--

A. I assumed that he was in for one of those following reasons.

Q. Yeah, but, I mean, now you're definitely, that you didn't know, when before you had testified we all knew it?

A. No. No, I said that he was there like most of the kids were there, to save embarrassment of some type from his family, that's what I am saying.

Q. Right?

A. Right.

Q. But, you agree that before you were pretty certain in testimony that he was there because he needed to hide about the Martha Moxley murder?

A. Oh, yeah, I have said that.

Q. You were pretty firm on that?

A. Yeah.

Q. But, we are not going with that today?

A. No, I would say that is still the case.

Q. That --

A. It is still the case that he was there to avoid justice for this.

Q. Did you know that when you first met him? That's the question.

A. No.

* * * *

May 20, 2002

[Page 152, lines 9 through 14]

[Testimony of Andrew Pugh]

Q. You testified previously that you were familiar with Michael Skakel and Martha Moxley in the year of 1975. Can you tell us if Michael Skakel ever spoke to you about Martha Moxley?

* * *

THE WITNESS: Yes.

* * * *

[Page 152, lines 22 through 27]

Q. Did he ever express his feelings to you during that time period about Martha Moxley?

A. Yes.

Q. And, what did he say?

A. Michael had told me that he liked Martha quite a bit and had a crush on her.

[Page 153, line 10 through Page 154, line 4]

Q. What else did he say about his feelings towards Martha Moxley during that time period?

* * *

THE WITNESS: That he like her very much and that he would have liked to have a relationship with Her.

BY MR. MORANO:

Q. And, did you ever see the two of them together?

A. Yes.

Q. And, did you ever see them engage in any kind of physical activity together?

A. Yes.

Q. And, what did you see?

A. Horse play, roughhousing, fooling around. I saw them kissing one time in the RV.

[Page 155, lines 11 through 23]

Q. Based upon what you saw between the interplay between Michael Skakel and Martha Moxley, were you able to observe how she reacted physically to Michael's advances at times?

* * *

THE WITNESS: She didn't seem as interested, seemed not to be quite as enthusiastic.

* * * *

May 21, 2002

[Page 143, lines 4 through 17]

[Testimony of Richard Hoffman]

A. Michael told me that, like the other boys, all the other boys in the neighborhood, he had a crush on Martha.

Q. And, did he express what his hopes were with Martha?

A. Well, he had a crush on her. I mean, he would like to have been closer. He told me they were friends.

Q. And, did he have a desire for an even closer relationship?

A. Closer than being friends, yes.

Q. What was that?

A. That's what it means when he had a crush on her.

Q. Did he want her to be his girlfriend?

A. Yes.

* * * *

May 22, 2002

[Page 11, Line 1 through Page 12, line 1]

[Testimony of James Dowdle]

Q. Now, the night of October 30, 1975, where were you in the early evening?

A. At the Skakel home.

Q. And, what were you doing there?

A. Just visiting and then we all went down to have drinks and dinner at the Belle Haven Beach Club.

Q. Do you remember you who went to the Belle Haven Beach Club with?

A. I can't remember everybody. There were a lot of people there.

Q. Of the people who you remember, who do you remember?

A. Skakel boys, Andrea Shakespeare, I think the young Ix girl was there.

Q. And after Belle Haven, where did you go?

A. Back to my house.

Q. Well, before you went back to your house, did you go back to the Skakel house?

A. Yes.

Q. You went back to the Skakel house, and at some point you went home?

A. Correct.

Q. And, how did you get home? Who drove you home?

A. Rush.

Q. Rush, Jr?

A. Rush Skakel, yeah.

Q. No question about that?

A. No question.

* * * *

[Page 12, line 7 through Page 13, line 4]

Q. Did anyone else go with you to your home?

A. Yes.

Q. Who?

A. Johnnie Skakel and Michael Skakel.

Q. Why did they go to your home if they lived in Belle Haven?

A They were giving me a ride home but we were going to go watch a television program at my house.

Q. And, what television program was that?

A. Monte Python.

Q. And, do you remember what time it was on?

A. 10:00 o'clock.

Q. And, did you watch the program?

A. We did.

Q. Now, when you say you and Rush and John Skakel and Michael Skakel left the Skakel home to go to your home,

you were going to see a 10:00 o'clock television show; correct?

A. Correct.

Q. Had you gotten there in time to see the beginning of the show?

A. Yes.

Q. By the way, what you are telling me here you told the police; didn't you?

A. I did.

* * * *

[Page 13, line 24 through Page 14, line 8]

Q. When you got in the car, who was in the car?

A. Rush, Johnnie and Michael and myself.

Q. And, do you know what time you left the Skakel house?

A. Approximately half nine, Nine 9:30.

Q. and, you got to your place when, if you remember?

A. A little before ten.

Q. Have you used anything to refresh your recollection of these events, by the way, before coming to the witness stand?

A. Just my taped interview with the Greenwich Police, I was given a transcript.

* * * *

May 24, 2002

[Page 97, Line 26 through Page 108, line 2]

[Testimony of Andrea Shakespeare]

THE COURT: Thanks so much, folks.

All right; ladies and gentlemen, I am admitting as a full exhibit portions of a statement by this witness to Detectives Garr and Solomon on or about June 11, 1991 apparently in Hanson (ph), Massachusetts. All right.

Mr. Sherman.

MR. SHERMAN: Yes, Your Honor. We are going to play the one portion by tape and the second portion we will read from the transcript. The transcript will be in evidence, however, it will not be published to the Jury other than having been read by us until a later time.

THE COURT: Play the tape first and then --

MR. SHERMAN: I would like to play the tape first and then read --

THE COURT: No, you will play it in the order in which the statement was given.

MR. SHERMAN: That's fine. All right; Your Honor.

THE COURT: Beginning on page 21.

THE WITNESS: Thank you.

MR. SHERMAN: Beginning on page -- line 24, have we agreed on that?

MS. GILL: Yes.

THE COURT: Page 21 line 24.

MR. SHERMAN: I will be reading the part of Inspector Solomon and if you could just read your own voice into the record.

THE COURT: Read where it says the witness.

THE WITNESS: Okay.

THE COURT: Do you follow?

THE WITNESS: Yes.

(Whereupon, the transcript was read as follows:)

Q. When the Terrien boy gets in, John gets in, Rushton comes in and they depart with the car?

A. With Michael?

Q. Um-uh. With Michael in the car?

A. Okay.

Q. Okay; this is the story we get and they depart and head north up to the Terrien house and it's ironic that you asked that question, with Michael, why did you ask that question?

A. I am just curious.

Q. Okay.

A. You know that it wasn't what I believe I heard -- excuse me, you know, that isn't what I believe I heard afterwards.

THE COURT: Had heard afterwards.

THE WITNESS: Had heard afterwards, sorry.

BY MR. SHERMAN:

Q. All right; now, see, these things may be very important for us, okay.

A. I don't know. I mean --

Q. Okay; well, that's okay. That's okay, that was our understanding of what occurred.

And then we skip to page 23, line 27.

THE COURT: Still you, Mr. Sherman.

BY MR. SHERMAN:

Q. Okay; now, the key comes is do you recall, do you recall anything about the Terrien boy or any of them departing the house just before you and --

THE COURT: Where is that? I am sorry.

THE WITNESS: I am sorry, that doesn't --

MR. SHERMAN: It's the top of page 24.

THE COURT: The key comes in, do you recall.

THE WITNESS: And then it says --

THE COURT: I am sorry, there is a double page there, flip two pages.

MR. SHERMAN: Top of page 24.

THE WITNESS: Okay.

THE COURT: Continue, Mr. Sherman.

BY MR. SHERMAN:

Q. Well, anything about the Terrien boy or any of them departing the house just before you and --

A. I don't know why my memory serves me this way but I thought it was Rush, Johnnie and Jimmy but I don't even know if I saw them leave.

Q. Okay; and, you got to remember that Michael was out of the car so he wouldn't have departed the house?

A. But, I didn't, I mean, I didn't see anybody after a certain point at --

Q. All right.

A. Except for Tommy who answered the door.

Q. Okay; now, that's interesting. See, that's interesting because you didn't see them, they weren't in the house, in other words?

A. I mean, the first I ever heard about guys sitting in a car listening to tapes is right now.

Q. Okay; okay, you said something about you were told. That wasn't what you were told?

A. For some reason, I don't know who told me, I don't know if it's -- I have heard it through the years or I don't know if I remember it, I -- I never thought that Michael made the trip to the Terriens. I thought it was the three boys.

THE COURT: It's still you.

THE WITNESS: I am sorry, did I ever see him in the house, no. Did I see him leave, no. I didn't see anybody after a certain point when I was sitting in the kitchen except Tommy.

Q. But, can you try to, you know, think, concentrate, why you didn't think Michael had left with the boys to the Terriens. What makes you think he didn't?

A. Well, I thought when we were recanting our stories 15 years later before, I am sorry, pre-15 years, pre-today, whatever, I thought I remembered hearing stories that Michael was in the back saying goodbye to Helen and never even heard about a Jeffrey Byrne.

THE COURT: Is that supposed to be recanting or recounting?

MR. SHERMAN: The transcript says recanting but –

THE COURT: Agreed that should be recounting?

MS. GILL: Yes, sir.

MR. SHERMAN: Yes, sir.

THE COURT: That's recounting our story, ladies and gentlemen. Go ahead.

(Whereupon, the reading of the transcript continued as follows:

Q. Um.

A. And Martha, I thought, it was the four of them out there, not that I saw but it's just what I have heard afterwards.

Q. Okay; do you remember who or --

A. No, I don't. I think it was, um, I remember the day coming home from school when we all had to go to the Skakels house and it was just, oh, my God, how could this have happened, how could this not and asking what the hell happened when I left, you know, after I left, what happened. And I thought that I heard, I don't know who, Frank.

Q. Um-uh.

A. That there were four of them back, in the back yard saying goodbye to each other. And I have always heard that through 15 years every time anyone has ever talked about what happened that night. It was my assumption and it's a total assumption that there were four people in the back yard.

Q. These four people?

A. And it was Tommy, Michael, Helen and Martha and I, I, I wouldn't know whether it is a story I was told from somebody, I don't know where the information came from but if you ask me what do you know about all that, I would say, well, I thought that these four people were in the back yard at the same time I was leaving out the front.

Q. Okay.

A. It's just what I--

Q. Consistent with that should be the scenario, is that story in conjunction with, in other words, you are told or somewhere somehow by someone that there is four saying goodbye to each other, Tommy, Michael, Helen?

A. Helen.

Q. And Martha and is that told in conjunction with the fact that Jimmy, John and Rushton left?

A. Right.

Q So, it's all told on the same --

A. If you ask me today, Andrea, what, who are the people who drove Jimmy Terrien home that night, I would have said I believe Rush and Johnnie Skakel. If you said who was supposedly in the back, I would have said Michael, Tommy, Helen and Martha, why, because those are what I, the stories that I heard.

Q. Okay.

A. None of which I was present for or saw them in my own two eyes.

THE COURT: With my own two eyes.

THE WITNESS: I am sorry, with my own two eyes. It's the tales I have heard over the years and I presume what I heard that day. I mean, I, I can hear coming from school -- I am sorry.

THE COURT: I mean I.

THE WITNESS: I mean I, I almost can hear coming home from school that two boys, Michael and Tommy, were in the back yard with the girls saying goodbye. Did I see it, no. Do I know it for a fact, no.

Q. And, you can't remember where or who you heard that from? You remember coming home from school, was it Julie?

A. I think it was Michael but I guess I don't know that for a fact. I mean, it's a guess.

Q. You think it was Michael who told you that?

A. I remember asking, I remember coming in the Skakel house and well, I, of course, you are 15 years old, you hear a girl gets murdered in you're --

Q. Yeah, sure.

A. And you're totally disoriented at some point.

Q. Um-uh.

A. The whole time, and I remember saying how, I don't understand, who saw her, who was with her, who walked her home, those, you know, you ask those questions.

Q. Um-uh.

A. And, I think I was told -- I am sorry, and I think I was told and by who, I wish I could tell you, I don't know the answer to this but that the four of them were in the back yard last. Those were the last people to have --

Q. After you?

A. And then Helen went.

Q. And the other, and John and Rushton left?

A. Right, I don't know that for a fact, though.

Q. Okay.

A. I am telling you what I, I have always assumed.

Q. That that's right?

A. Through the years, that's who was there.

Q. Well, that throws an out to us?

A. I don't know why I am saying, that's another thing, I mean, it's --

Q. That's okay, because something is in there.

A. Right.

Q. That's making you say that.

A. No matter what it is --

THE COURT: No, I think that's Mr. Sherman's part.

THE WITNESS: I am sorry.

MR. SHERMAN: I am sorry too.

BY MR. SHERMAN:

Q. No matter what it is, this is what we need you to do today. If you think of things, if you know, or if you have --

A. If you told me that Michael Skakel was in that car driving home, I would say no, I don't think that's right. Why I don't think it is right, I, I didn't see them leave so I can't tell you who was in that car.

Q. Yeah, okay.

A. But, I have always thought that Michael and Tommy and those two -- I am sorry, but I have always thought that Michael and Tommy and those two guys and when you are talking about conjecture, inaudible.

Q. That you know about him, yeah, that's interesting.

A. I don't even know if, inaudible, I never saw him before in my life.

Q. That's interesting, he was there, no question about it, that the boy was there?

A. And that I think, you know what, I think I saw Helen at some point that night but I don't know for sure because often times I would be at the Skakels house and Helen had come over.

Q. Okay.

A. So, whether it was in that night, it's the same thing as with the backgammon, I mean, there was so many times I was there and Helen was there and I was playing back -- you know what I mean.

Q. Um-uh.

A. That I remember the backgammon but, you threw me for a loop when you told me Michael took --

Q. That's interesting you bring that up because that's one of the areas obviously that we want to check on or probe a little further.

A. Who told you Michael drove him home?

Q. Well, this is during --

A. Is it listening to everybody?

Q. Exactly, generally speaking.

A. What about his original, what about his original, what does he say?

Q. Oh, he says he went to Terrien's house.

A. Yeah.

Q. Now we skip down to line 20 of that page, line 20 on page 31. Start with put.

THE COURT: That's your line.

A. Okay, put this way, I didn't see Michael there when I left at the house, he didn't answer the door, Tommy did.

Q. Right.

A. But, let me ask you something, when they came back -- did they come back?

Q. Yeah, oh, yeah, much later. Let's go back to the, to the people who were left after the car left to bring Terrien home.

THE COURT: I am sorry, is this where you wanted to go to the tape or not?

MR. SHERMAN: Yes, that is correct.

* * * *

[Page 115, Line 4 through Page 117, Line 9]

BY MR. SHERMAN:

Q. When you told Inspector Garr and Inspector Solomon when they asked you how you knew that Michael was not in the car and you said um and then I thought, because I heard, because of what has been, you know, told over the

years is that Michael and Tommy and Martha and Helen were out back. I thought it was a foursome, maybe like four of them were hanging out, chit chatting and then the girls went to go home and the boys came in the house. That's what I always assumed.

Were you telling him the truth?

A. Yes.

Q. So, the basis that you have for saying that Michael was there after the car went to the Terriens is that's what you heard, that's when you have assumed, that's the stories you have been told?

MS. GILL: Objection, Your Honor, he is leading and this is his witness.

MR. SHERMAN: It's obviously a hostile witness, Your Honor.

THE COURT: Sustained. Sustained.

BY MR. SHERMAN:

Q. What is the basis for you saying that Michael Skakel remained after that other car went to the Terriens, what do you base that on?

A. I base it on my memory, sir.

Q. And, what is your memory, what does your memory tell you?

A. My memory tells me that Michael was still there when the car left.

Q. Did you see him in the house?

A. No.

Q. Did you see him leave?

A. No.

Q. When you went to the door, did he answer the door or did somebody else answer the door?

A. Somebody else answered the door.

Q. Where did you see him, then?

THE COURT: Where did you see who then.

BY MR. SHERMAN:

Q. Where did you see Michael after the Terrien car left?

A. I did not see Michael after the Terrien car left.

Q. And, when Inspector Garr and Inspector Solomon asked you why you believe Michael was still there, you told them because those are the tales that had been told. Is that correct?

A. That is correct.

Q. Did you ever read the Mark Furhman book, by the way?

MS. GILL: Objection, this is beyond the scope.

MR. SHERMAN: She said stories and tales, Your Honor. I am asking if that's one of the stories.

THE COURT: Overruled.

BY MR. SHERMAN:

Q. Did you ever read the Mark Furhman book?

A. Yes, I did.

Q. When did you read it?

A. When it first came out.

MR. SHERMAN: Nothing further.

* * * *

May 28, 2002

[Page 26, line 3 through line 27]

[Testimony of John Skakel]

Q. Did you give a statement to the police? They recorded you?

A. Yes.

Q. Was that on November 14, 1975?

A. I don't recall the specific date.

Q. It was a couple of weeks after the incident?

A. Yes, that sounds right.

Q. And, you told the Grand Jury that whatever you said then is what the deal was?

A. I told them that I felt that at that time that's when I had a very clear memory of what went on. It was only a few weeks after, you know, this all took place.

Q So, would it be fair to say you didn't have a clear memory when you testified before the Grand Jury?

A. No, I was largely depending on the testimony that I had given in 1975.

Q. And, you asked them, please rely on what I said back in 1975?

A. That's right.

Q. And, today you don't have a clear memory as well; do you?

A. No, it hasn't gotten clearer over time.

Q. If anything, it has probably gotten worse; has it not?

A. I would say so.

* * * *

[Page 32, line 10 through Page 35, line 9]

MR. BENEDICT: I have, what was it, O, Exhibit O, something like that.

THE CLERK: Right.

MR. BENEDICT: I have that.

THE COURT: That's the transcript.

MR. BENEDICT: I gave counsel a second copy. It's the actual police transcript.

THE COURT: Can we start again?

MR. SHERMAN: Sure.

(Whereupon, the exhibit was read as follows:)

Q. Okay, the interviews are continuing with John Skakel. Okay, John, on the night in question, which was the night before Halloween, October 30, you want to run it through again, what you actually remember about this particular night with specific reference to Martha Moxley?

A. Well, there were, ah, a few of us, Jimmy Terrien, myself, I think Tommy.

Q. Excuse me, John, can you start right from the Belle Haven Beach Club?

A. Yeah, that's right. We came back from the Belle Haven Beach Club. I am sorry, I read the wrong part. Sorry.

Q. I am all the other interviewers.

A. I am sorry.

Q. Yeah, that's right, you came back from the Belle Haven Beach Club?

A. Yeah, we ate dinner there.

Q. How was everybody dressed in your family?

A. Coat and tie.

Q. Wearing coat and tie?

A. Yeah.

Q. Everybody wore a coat and tie?

A. Um-uh.

Q. Can you start from going to the Belle Haven Beach Club about approximately what time they left?

A. I think we ate dinner around 7:00 or 7:30.

Q. Okay; name everybody that was there?

A. Myself, Michael, or Stephen, David, Michael, Tom and Julie and I believe Andrea Shakespeare was there and Ken. Then from there, after dinner, we went back up to the house and played some backgammon.

Q. What time did you get back to your house?

A. I suppose it must have been about 8:30 or 9. Then we went and we were on the porch. Martha Moxley and Helen Ix and Jackie Byrne came over and they knocked on the porch window but they didn't -- we didn't let them in. They went around. They just went around, around the back door. Then in a few minutes, we went to bring Jimmy Terrien home. It was myself, Michael, Jimmy and Rush.

Q. What about your older brother, Rush?

A. I forgot to mention, he was at dinner.

Q. All right.

A. And, we were, ah, in the red car leaving from the driveway by the back door. And when we left, Tom and Martha were standing there and, um, I am not sure if Jeffrey Byrne and Helen Ix, I am not sure if they left and we pulled out of the driveway and left for Terriens.

Q. Okay; what time did you get back from Terrienns?

A. Ah, since I know we left Terriens at about 11, maybe a few minutes after, I assume we got home at 11:15, maybe a little bit after.

Q. What did you do at the Terries?

A. Just watched TV.

Q. What program were you watching?

A. Monte Python.

Q. What time does that come on?

A. Thursday nights at ten.

Q. You watched the whole program?

A. Um-uh.

Q. It's a half hour program?

A. Yeah. Wait, no, it's a bit longer.

Q. Then you returned -- who returned with you?

A. Just myself, Michael and Rush.

Q. Arriving at your house at what time, approximately?

A. 11:15.

Q. I want you to continue on.

A. Then I guess we all went our separate ways. I went in my room for awhile and I don't know, about a half hour, maybe an hour later, I went and got a snack. And then I came back to my room and went to sleep.

* * * *

[Page 57, line 19 through Page 59, line 2]

Q. Is it true that before the Juror -- withdrawn. Now, when you went into the Grand Jury room, you went in there alone; correct?

A. Yes.

Q. You didn't bring an attorney with you?

A. No.

Q. You were placed under oath much as you were placed under oath here in morning?

A. I believe so, yes.

Q. And, isn't it true that when the subject of the trip to Terriens was broached before the Juror, your response was I just know that I was part of a group that went at some point in time later on to my cousin's, the Terriens slash Dowdles. That's your recall today?

A. Yes, that sounds right. I really was very much depending on my testimony from 1975.

Q. Right, I understand that. And, of course, you recall being asked before the Juror if you could specifically remember whether or not your brother, Michael, made the trip to Terriens? Do you recall being asked that by -- in the Grand Jury room?

A. Not -- I mean, I know they asked it at some point.

Q. You know they asked?

A. Yes.

Q. And, do you recall today that your response was when you were asked that question?

A. No, I just recall that I -- it was kind of -- I didn't remember. I really did have to read it.

Q. Right. You just simply did not recall whether he went or not?

A. No, I didn't.

Q. Is that your testimony today, that based on your recall here in the year 2002 and nothing else, that you just

don't recall whether or not your brother, Michael, was in the car that went up to the Terriens?

A. That's right, I would love nothing more than to have clearer memory but that's the way it is.

* * * *

[Page 60, lines 4 through 21]

BY MR. BENEDICT?

Q. Indeed, what happened, do you recall, in the Grand Jury room, when you really couldn't answer those questions, who went to Terriens and more specifically did Michael go to Terriens, you were given a copy of that 1975 police department interview transcript?

A. That's right.

Q. And, do you recall being asked within the Grand Jury room whether or not that -- withdrawn. You were given it and you took the opportunity to read it in the Grand Jury room?

A. To myself, yes.

Q. And, do you recall what your answer was in the Grand Jury room when you were asked whether or not that transcript refreshed your recollection?

A. I don't believe it did.

Q. It just doesn't refresh your recollection?

A. No.

* * * *

[Page 128, line 22 through Page 129, line 15]

[Testimony of Joseph Jachimczyk]

Q. When the Greenwich Police detectives contacted you, they wanted your help to determine the time of death?

A. Yes, sir, that was the primary purpose.

Q. And, did they give you -- they gave you information that they had?

A. Right.

Q. And, they gave you the autopsy report you have indicated. They gave you the autopsy report?

A. Yes, sir.

Q. And, they gave you the pictures of the autopsy report you have indicated They sent you pictures of the victim? Did they send you pictures of the victim?

A. They said they did but I don't remember specifically. I think they probably did but I don't recall specifically.

Q. Did they send you a diagram of the crime scene?

A. Yes, sir, I saw that.

Q. I am going to show you a piece of paper and ask you if it refreshes your memory as to whether or not they sent you 24 photographs of the victim and if you can just look up there, read it to yourself for a moment?

* * *

[Page 129, line 26 through Page 131, line 25]

(Brief pause.)

THE WITNESS: Yes, sir, I saw that material, except I just didn't quite fully remember how much I saw.

BY MR. SHERMAN:

Q. Does this refresh your memory as to the material that they sent you so that you could help them learn the time of death?

A. Right.

Q. And they sent you 24 photographs of the victim?

A. Yes, sir.

Q. And, they sent you a diagram of the crime scene?

A. Yes, sir.

Q. And, they sent the autopsy report?

A. Yes, sir.

Q. And, in addition to that, did you have a couple of discussions with them on the telephone?

A. Yes, sir.

Q. And, when you discussed these things with them on the telephone --

A. I am not hearing you, sir. I am sorry.

Q. When you talked with them on the telephone --

A. Yes, sir.

Q. What type of information did they talk about with you? Not what they said, but what is the type of information?

A. Well, they talked about the historical background of the case, what was known. They described the scene of the death. We talked about the autopsy findings and results and they asked me to submit a written report in answer to the questions that were asked in their original communication to me in writing after the first telephone conversation.

Q. And, did you --

A. Then we had a second conversation afterward and then I wrote my report.

Q. And, showing you what has been marked as Defendant's Exhibit A for identification --

THE COURT: Defendant's exhibit what?

MR. SHERMAN: A.

BY MR. SHERMAN:

Q. Is that a copy of the report that you sent them after speaking to them and after examining the materials that they sent you?

A. Yes, sir, it is.

Q. And, after examining the materials they sent you and speaking to them, did you come to a conclusion as to when --

A. I am not hearing you, sir. I am sorry.

Q. Did you let them know in this report when you believed the time of death was?

A. Yes, sir.

Q. And, what was that?

A. About ten p.m. on October 30, 1975.

* * * *

[June 3, 2002]

[Page 20, line 11 through Page 21, line 2]

[State's Closing Argument]

And, then the alibi, that is the cornerstone of the defense here. It is a somewhat unbalanced alibi because due to the defendant's ongoing tales in the 1990s, you can accept the alibi at face value and still convict the defendant but you of course will want to take a careful look at that alibi. You will want to look at how was it produced.

Somebody had the bright idea to get the players out of town in the immediacy of the investigation on October 31. Rushton, Jr. had already gone off to Washington D.C., so Tom, John, Michael and Jim Terrien were taken out to Windham by Ken Littleton. Not until after their return from Windham did the alibi begin to come up.

Indeed, you just heard of the events of November 15 a lot last week, how father Rushton took all of his kids, Terrien as well, as a group, to give their stories to the police. By whom was it produced.

* * * *

[Page 97, line 6 through Page 99, line 17]

[State's Rebuttal Argument]

Let's stay with the subject of time. Let's stay with the alibi. Why is it so suspect. How was it produced. What did the Skakel family do -- and I didn't really hear much from Mr. Sherman on this -- what did the Skakel family do to put this together.

Someone seeing the police all over the place decided, had the sense to get the players out of the area. The oldest brother had already gone off to D.C. so the first thing the next morning Littleton was ordered to take the four players, Michael, John, Thomas and Jim Terrien, out of the way for awhile, for a short trip upstate.

Now, clearly, that wasn't decided for the sake of protection of these kids because we know Julie and the two younger stayed behind and Jim Terrien didn't live anywhere nearby. The importance of that sudden brief one night trip is that the alibi didn't begin to take shape until some time after the return from Windham.

And then you have the additional fact of two weeks after the murder, father Skakel, father Rushton Skakel, escorting the entire family together plus Jim Terrien almost like leading the VonTrapp family over the alps to the police station to give their recorded but unsworn statements.

Consider who the alibi witnesses are, all siblings or first cousins, not one single independent alibi witness. As our alibi witnesses for Thomas Skakel and Ken Littleton, they are independent.

Consider what the family group did to advance the alibi here in the courtroom. In almost every alibi, there is always a grain of truth. The grain of truth here is that somebody gave Jimmy Terrien a ride home. Yet, even on this basic fact, the defendant's witnesses couldn't get on the same page. Brother John today or I should say last week says he simply can't recall and I will talk more about that in a few minutes. Even beyond John, though, no one, Terrien, Rush, Jr, Georgeann, Julie, claims to recall much else.

Under the circumstances of this case, that is simply incongruous. Ever since October 31, 1975, one of two particular Skakel brothers, Thomas or Michael, has been the prime suspect in this case. The entire family has been under a cloud. It has been one of the most notorious murders in this country's history in the last 27 years, not to mention the fact that it was these people's innocent next door neighbor, a playmate of some of them, who was murdered.

Brother John missed the nail head completely when he testified because of all the hype he somehow really can't remember everything or can't get the facts together anymore. That is absurd.

Ladies and gentlemen, for all people there are things in life that you are compelled to remember, that you have a need to keep forever straight in your mind no matter how far in the past they are, things that become indelible. When your cousin or brother is a suspect in a horrendous crime and you happened to have been involved with that person on the night of that crime, common sense tells us that you will retain the events of that night as though they were on videotape. Unless, of course, you were drunk or stoned or high or a combination of the three and then you really can't recall, which could be the case here.

[Page 99, line 27 through Page 102, line 5]

What the evidence says the Skakels and Terriens have done under oath before you and some even previously before a Grand Jury is intentionally suppress their memories and claim a lack of recall. Why, because in their actual recall lies the truth.

And, in their inexplicable claim of inability to recall almost anything beyond a red Lincoln going up to Terrien's house is evidence that what they truly remember they simply don't want you to know.

Brother John, cousin Georgeann, they spoke to the police in 1975, as did everybody else. They were not under oath at that time. Certainly they were a lot more malable then as 16 and 17 year olds than they are now as adults. Certainly they are today a lot more aware of the consequences of lying here. For some people, that can cause a dilemma. Yet both before the Grand Jury, not having to face the defendant or the rest of the family, wiggled out of their dilemma by claiming a lack of recall even when in the Grand Jury we attempted to refresh their recollections with their 1975 statements. Here, face to face with the defendant, with their cousins and siblings, the pressures are dramatically greater. So, still wiggling, they managed to try to enhance their recall and still avoid the consequences of perjury.

And then there is sister Julie. Julie having incriminating information to give was passed over by the defense, apparently. So, the state took her on as its own witness. She had no difficulty hitting the balls, I think you might have noticed, that Mr. Sherman served up at her in what you could call quote unquote cross-examination as to the fact that as she waited for the car keys, the driveway was deserted which is what she testified to in the Grand Jury back in 1998. To the questions of the Grand Jury, were there any cars in the driveway, did you see any cars leave, she simply responded no. That was in 1998.

Now, in 2002, it's, well, what I really really meant was I don't recall. What in 1975 when she said Michael come back here she was calling to her brother here in 2002 somehow became just last week she didn't think it was the defendant, even though she called to him to come back, it doesn't make sense.

And then, as the best example of trying to do whatever she can do for the defendant here, she points a belated, very belated finger at Ken Littleton. The person carrying the package who she saw run across the front yard as she got back home from dropping off Andrea Renna was a lot bigger than the defendant. We learned that in 2002. We never heard that before. Better than that even, seeing Littleton in the kitchen sometime shortly after 10:00 o'clock, 27 years later, now she recalls that Littleton had changed his clothes. We never heard that before last week either.

Julie Skakel is the best example of a family support group continuing to this day to do whatever it takes to keep the wraps on Michael Skakel.

* * * *

[Page 110, lines 11 through 19]

In that regard, we also heard much from Mr. Sherman as to how cooperative the Skakel family was or were they. He let the police take a four iron they had seen the day before. He let the police search the place up in Windham for something that was obviously wasn't there. And then he escorted or rehearsed a group of alibi witnesses down to the police station a few weeks later. Frankly, the state is not really impressed.

* * * *

[Page 112, lines 7 through 16]

. . . . It is unquestionable that when the defendant repeatedly struck Martha with the golf club, crouched over her

to stab her, masturbated on her that he got plenty of her blood on himself. But that evidence, like the ingredients of chop sui, as Dr. Lee testified a few weeks ago, needs to be collected before it can be used. By the time Detective Lunney arrived at the Skakel home to collect that four iron, they had 36 hours to dispose of the evidence. In fact, they were already on their way to Windham.

* * * *

[Page 116, lines 8 through 13]

Motive, the defense suggests the state hasn't shown you any evidence of motive. Let's look at that. Let's look at Tom Skakel first. From Martha's diary, we know he was flirting with Martha. We know also, he was engaging in some embarrassing horse play in the driveway prior to parting. . . .

* * * *

[Page 116, line 27 through Page 117, line 16]

We learned in the course of this case that Michael Skakel was infatuated with Martha Moxley. We learned that from Andy Pugh and Richard Hoffmann, not to mention the diary.

We learned also that Martha's diary brought out the jealousy between Tom and Michael over her. We also know from Michael Meredith that the defendant had been spying on Martha from that tree. The defendant's feelings apparently went uncomfortably beyond mere infatuation.

We also know that he asked, from Mr. Hoffmann, Martha to spend the rest of the evening with him and we know that she wound up with Tom. We know that she was engaging in embarrassing horse play in the driveway with Tom. We also know from Alice Dunn the defendant was not in his normal state that night.

* * * *

[Page 129, line 11 through line 19]

And the amazing thing about those dozen admissions of the defendant, it is not like they were produced as a group. It is not like they were marched down to the Greenwich Police Station by Dad to all give an alibi. These people have absolutely nothing to do with one another. Even the four people that came out of Elan, Rogers, Coleman, Higgins and Dunn, have nothing to do with one another. It's as though each came from a separate planet.

APPENDIX F

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF FAIRFIELD

S.C. 16844

STATE OF CONNECTICUT

V.

MICHAEL SKAKEL

BRIEF OF THE STATE OF CONNECTICUT-APPELLEE
WITH SEPARATE APPENDIX

TO BE ARGUED BY:

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* * * *

COUNTER STATEMENT OF ISSUES

1. DID THE TRIAL COURT CORRECTLY DETERMINE THAT DEFENDANT'S PROSECUTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS?
2. DID THE STATE VIOLATE THE COURT'S DISCOVERY ORDERS OR FAIL TO DISCLOSE EXCULPATORY EVIDENCE?
3. DID THE JUVENILE COURT APPROPRIATELY ORDER THE TRANSFER OF THE DEFENDANT TO THE CRIMINAL DIVISION OF SUPERIOR COURT?
4. ARE THE DEFENDANTS UNPRESERVED CLAIMS OF PROSECUTORIAL MISCONDUCT SUPPORTED BY THE RECORD?
5. DID THE ADMISSION OF COLEMAN'S PROBABLY CAUSE HEARING TESTIMONY VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION?
6. DOES THE DEFENDANT'S INADEQUATE BRIEF AND AN INADEQUATE RECORD PRECLUDE REVIEW OF DEFENDANT'S COERCED CONFESSION CLAIM?
7. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ANY OF THE THREE DISCRETE EVIDENTIARY RULINGS DEFENDANT CHALLENGES?

* * * *

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT'S PROSECUTION WAS NOT BARRED BY THE STATUTE OF LIMITATIONS

The defendant's primary contention is that the trial court erred in denying his Motion to Dismiss. Defendant asserts that a murder committed in 1975 is subject to a five year statute of limitation. DB at 16. In so doing, defendant relies on the provision within our former statute of limitations, General Statutes §54-193 (Rev. to 1975) which imposed a five year limit on prosecutions for any offense the punishment for which "is or may be imprisonment." Defendant argues that *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (1983) determined that murder under General Statutes §53a-54a (Rev. to 1975) was subject to this provision, and not the statute's exemption from limitation for crimes "punishable by death." DB at 16-20.

In addition, defendant argues that second degree murder, an offense recognized in Connecticut prior to the enactment of the penal code, was subject to a statutory time limit on prosecutions. This, he contends, is why the parties and the court in *Paradise* assumed that murder was so limited, and, rather than address the applicable time limit, focused on whether an amendment to the statute of limitations should be applied retroactively. *See* DB at 20.

State v. Paradise rests on a faulty assumption. Connecticut has never recognized a time bar to the prosecution of murder. As this court held in *State v. Golino*, the phrase "crimes punishable by death" contained in our former statute of limitations referred to a category of offenses so atrocious as to be subject to prosecution at any point. The 1976 amendment to the statute of limitations, which expressly exempts all class A felonies and capital felonies from repose, clarified the meaning of the original enactment. That

amendment, therefore, made clear that murder had been, and remained, exempt.

Further, defendant is wrong to suggest that the type of murder of which he stands convicted was subject to a statutory time limit from 1851 to 1971. It is not at all clear that second degree murder was subject to a statutory limit on prosecutions as defendant contends. But even if it were, murder in the second degree was akin to modern day manslaughter, not murder. Upon pre-penal code law, the intentional taking of human life – of which defendant stands convicted – was murder in the first degree, and hence indisputably outside any limitation period. Thus, if committed at any point from colonial times to the present day, defendant's offense would be subject to prosecution without limitation.

A. Defendant's Motion to Dismiss and the Trial Court's Ruling Thereon

Pursuant to an arrest warrant dated January 14, 2000, the defendant was arrested and charged with the October 30-31, 1975 murder of Martha Moxley. The defendant moved to dismiss. He argued that the statute of limitations in effect on the date of the offense, General Statutes § 54-193 (Rev. to 1975)[5] barred his prosecution because it was not commenced within five years of the homicide. *See* DA at A31.

After additional briefing, the trial court (Kavanewsky, J) denied the motion in a written Memorandum of Decision (reproduced in DA at A32-39). The trial court gave careful consideration to a trilogy of cases from this court: *State v. Paradise*, *supra*, *State v. Effis*, 197 Conn. 436, 497 A.2d 974 (1985) and *State v. Golino*, 201 Conn. 435, 518 A.2d 57 (1986). The court relied on the teaching of *Ellis* and *Golino*

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[5] All pertinent statutory provisions and curt rules are included in either the Defendant's Appendix (DA) or the State's Appendix (SA).

that Connecticut's statute of limitations "'as a whole, represents a system, a classification scheme whereby the allowable period of prosecution *is related to the gravity of the offense*:" DA at A38, *quoting State v. Golino*, 201 Conn. at 444 (emphasis supplied in Memorandum). The court further relied on this Court's conclusion that the "'legislature used the phrase 'punishable by death' in our limitations statute as a shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution.'" DA at A38-39; *quoting Golino*, 201 Conn. at 446. The court concluded that the gravity of the offense at issue, murder, has been "historically unquestioned." Accordingly, the trial court denied defendant's motion to dismiss. DA at A39.

B. The Assumption Underlying Paradise Is Wrong: Connecticut Has Never Placed a Time Limit on the Prosecution of Murder

In *Paradise*, the defendant was arrested in 1981 for a 1974 murder. *State v. Paradise*, 189 Conn. at 347. He was charged with the same version of the murder statute at issue here: General Statutes §53a-54a (Rev. to 1975). He claimed that his prosecution was barred under the statute of limitations. The state did not contend that the offense was exempt under the statute. Instead, it argued that the 1976 amendment to the statute of limitations, which expressly exempts all class A felonies and capital felonies, should be applied retroactively. *See* State's Brief in *Paradise*, DA at A140-A160; see also PA76-35 codified in General Statutes §54-193 (Rev. to 1977). Thus, in Paradise, the sole issue presented was "whether or not the current criminal statute of limitations, General Statutes §54-193, is to be applied retroactively." *Id.* at 347.

After considering cases addressing the issue of retroactivity, and the policy implications of retroactive application of criminal statutes, this court held that "criminal statutes are

not to be given retroactive effect absent language clearly necessitating such a construction" and "54-193 contains no such language." *Id.* at 353. Accordingly, this court affirmed the trial court's dismissal of the murder charge Paradise faced.

It is clear, therefore, that Paradise did not decide whether a 1975 murder is subject to a five year limit on prosecution. *See State v. Ellis*, 197 Conn. at 461 ("The only issue actually litigated and decided in *Paradise I* was whether the amended statute of limitations would receive retrospective application.") It is also clear, however, that both the parties and the court assumed that the pre-1977 statute of limitations precluded the prosecution of murder under General Statutes 53a-54a (Rev. to 1975) unless commenced within five years of the offense. That assumption, arrived at "without the benefit of either a crystallization of the issue that naturally evolves out of an adversarial presentation, or the most persuasive legal authority that can be mustered in support of a position"; *State v. Magnano*, 204 Conn. 259, 277, 528 A.2d 760 (1987); should be examined and discarded.

1. The term "crimes punishable by death" refers to a category of offenses which has always included the intentional killing of another

Testing the assumption underlying Paradise requires an examination of the history, language, and precedent surrounding both our statute of limitations and our murder statute. At the time of this offense, General Statutes §54-193 (Rev. to 1975) "prescribed a five year limitation period on prosecutions 'for treason ... or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers . ..'" *State v. Golino*, 201 Conn. at 438. "The second clause of the statute provided a one year period of limitation on prosecutions 'for the violation of any penal law, or for other crime or misde-

meanor, except crimes punishable by death or imprisonment at Somers."' *Id.* "Implicit in this statutory scheme is that 'crimes punishable by death' were outside any limitation period, and thus always amenable to prosecution." *Id.*

The murder statute under which defendant was convicted, General Statutes § 53a-54a (Rev. to 1975), provides in pertinent part: "(a) A person is guilty of murder when, with intent to cause the death of another, he causes the death of such other person or a third person . . . . (c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed, as provided by Section 53a-46a."

In *State v. Golino*, this court held murder under General Statutes §53a-54 (Rev. to 1972) was exempt from any statutory time limit. At the time of the offense in *Golino*, Section 53a-54(c) (Rev. to 1972) provided that "[m]urder is punishable as a class A felony unless the death penalty is imposed as provided by section 53a-46." Despite this provision, Golino argued that the offense of murder was not, in fact, punishable by death because of the intervention of *Furman v. Georgia*, 408 U.S. 238 (1972). This court interpreted Furman as having invalidated Connecticut's capital sentencing statute. *See State v. Aillon*, 164 Conn. 661, 662, 295 A.2d 676 (1972). Golino claimed therefore, that because the only possible punishment for murder at that time was imprisonment, the five year limit should apply to his prosecution. *Id.* at 439.

In light of *Furman*, the question addressed in Golino was "whether, by using the phrase 'punishable by death' in §54-193, the legislature intended to exempt from the statute crimes which *actually* could be punished by death, the exemption being because of the severity of the punishment imposed, or whether it intended to exempt a specific category of crimes which, because of their heinous nature, should always be amenable to prosecution." *Id.* at 443 (emphasis in original). *Golino* held it was the latter, and determined that the

"legislature used the phrase'punishable by death' as a shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution." *Id.* at 446.

Golino arrived at this conclusion in reliance on the historical analysis undertaken by this court in *State v. Ellis*, supra. *Id.* at 443-44. Following the dismissal of charges in *Paradise*, the state recharged Paradise and his co-defendants, Ellis and Worthington, with capital felony murder under General Statutes §53a-54b (Rev. to 1975). On appeal in *State v. Ellis, supra*, this court rejected Ellis' claim that because capital murder could be punished by life imprisonment rather than death the five year limit should apply. Instead, this Court found the prosecution of Ellis et al exempt from limitation. In so doing, this Court emphasized that our statute of limitations must be read in light of its history and underlying policy:

> This court does not interpret statutes in a vacuum, nor does it refuse to consider matters of known historical fact. When aid to the meaning of a statute is available, "there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"... A statute such as this, enacted more than one hundred sixty years ago, cannot meaningfully be interpreted "in isolation, but must be read in light of the common notions of the day and the assumptions of those who drafted [it]."... And although criminal statutes are strictly construed, it is equally fundamental that the rule of strict construction does not require an interpretation which frustrates an evident legislative intent.

State v. Ellis, 197 Conn. at 445.

Viewing the language of the statute through the prism of history, this court held that despite changes to the crime of murder and its punishment, it could discern no legislative intent to thereby change the allowable period of prosecution. *State v. Ellis*, 197 Conn. at 459. *Ellis* also interpreted the statute as classifying offenses by their maximum possible penalty for purposes of determining the applicable time period. *Id.* at 454. In addition, *Ellis* found the legislative history of the 1976 amendment to the statute of limitations, which removed the antiquated language and stated expressly that capital crimes and class A felonies are never time barred, instructive. That history revealed that the amendment was intended to *clarify*, rather than change, existing law. *Id.* at 459-60. *See* 19 S. Proc., Pt. 1, 1976 Sess., p. 341. The court, therefore, concluded that a crime punishable by either death or imprisonment was "punishable by death" for purposes of the statute of limitations. The prosecution of the defendants, who were charged with capital felony, was not barred. *Id.* at 460.

Applying *Ellis* and *Golino* to this case reveals the soundness of the trial court's decision. Importantly, the elements of the crime of murder which this defendant faced, and those at issue in *Golino*, are identical: causing the death of another person with the intent to cause death. *Compare* General Statutes §53a-54 (a)(1) (Rev. to 1972) with General Statutes §53a-54a(a) (Rev. to 1975). Therefore, if the offense at issue in *Golino* was so atrocious as to be subject to prosecution at any point, the same must be said for this offense.

The only change between the time of the *Golino* homicide and this offense came, not to our statute of limitations, but to our murder statute. In 1973 the legislature enacted Public Act 73-137 (PA 73-137) (reproduced in its entirety in SA A14-22). That Act repealed the former murder statute, General Statutes §53a-54 (Rev. to 1972), retained the old

statute's definition of murder as the intentional killing of another, and added a provision which designated certain murders capital felonies. *See* PA 73-137 §2(a); *but see* PA 73-137 §3(6). The Act also provided that "murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed by Section 53a-46a." PA73-137 §2(c).

Although PA73-137 repealed and amended the murder statute between the commission of the crime at issue in Golino and the commission of this offense, nothing in the Act's language or history suggests a change to the allowable period of prosecution for murder was intended or effectuated.

2. Public Act 73-137, which amended our murder statute and created the offense of capital felony, did not change the allowable period of prosecution for murder

a. Nothing in the language of PA 73-137 suggests such a change

Neither the language nor the legislative history of PA73-137 suggests our former statute of limitations should be interpreted differently than this court did in *Golino*. "'The process of statutory interpretation involves a reasoned search for the intention of the legislature. *State v. Courchesne*, 262 Conn. 537, 577, 816 A.2d 562 (2003). In determining that meaning, [a reviewing court] look[s] first to the words of the statute and its relationship to other statutes. If the meaning of the statute is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." *Lostrito v. Community Action Agency*, 269 Conn. 10, 18-19, A.2d (2004) relying on PA 03-154. Because neither the text of the two statutes at issue nor the relationship between them reveals the legislature's intent plainly and unambiguously, this Court may appropriately consider extratextual evidence.

Turning first to the language of PA73-137, several sections of the Act either indicate the legislature did not intend to charge the statute of limitations, or are at least ambiguous on this point. For instance, Section 2 (c) of PA73-137, (codified in General Statutes §53a-54a(c) (Rev. to 1975)) provides that "[m]urder is punishable as a class A felony unless *it is* a capital felony and the death penalty is imposed as provided by section 4 of this act" (emphasis added). Notably, the legislature did not say murder is punishable as a class A felony, *and* capital felony is punishable as either a class A felony or by sentence of death. Instead, the legislature continued to use the term "murder" to describe a category of crimes "punishable by death." Thus, the legislature did not materially change the classification of murder from what it had been under General Statutes §53a-54 (Rev. to 1972) interpreted in *Golino*. *See also* PA 73¬137, Section 1 (codified as General Statutes §53a-45(a) (Rev. to 1975) ("Murder is punishable as a class A felony unless it is a capital felony and the death sentence is imposed as provided by section 4 of this act") (emphasis added).

The placement of this language in Section 2 of PA 73-137 (and later codified in the same section as the definition of murder, General Statutes §53a-54a (Rev. to 1975)) is also significant. Subsection 6 (c) of PA 73-137 indicates that the "classification of each felony defined in this chapter is expressly designated in the section defining it." Therefore, because the PA 73-137 Section 2 both defines murder as the intentional killing of another (PA 73-137 2(a)) and expressly designates murder as either a class A felony or a capital felony (PA 73¬137 2(c)), this legislation classifies murder as an offense "punishable by death."[6]

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[6] The state recognizes that it was precluded from seeking the death penalty for the defendant, under PA 73-137, Section 4(f)(1), codified as

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Importantly, the section defining capital felony, PA 73-137 §3, does not contain a classification for that offense. Section 4 of the Act, however, which sets forth capital sentencing procedures, states in subsection (e) that if the fact-finder fails to make the requisite findings for the death penalty, "the court shall impose the sentence for a class A felony." *See* General Statutes §53a-46a(e) (Rev. to 1975), codifying PA 73-137 §4(e). Capital felony, therefore, like murder, is subject to two possible punishments, either as a class A felony, punishable with imprisonment, or as a capital felony punishable by death.

Two offenses may be the same for some purposes yet different for others. *State v. Ellis*, 197 Conn. at 471-72. Here, the legislature gave murder and capital felony a common penalty classification despite the fact that their elements differ.[7] The singular classification of murder and capital felony bring the *Ellis* analysis to the fore.

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General Statutes §53a-46a(f)(1) (Rev. to 1975) which prohibits a sentence of death for anyone under the age of eighteen at the time of the offense. Nevertheless, as this court recognized in Golino, 201 Conn. at 443, 446, by excluding offenses punishable by death from the reach of our limitations statute, the legislature intended to exclude a certain category of crimes based on their heinous nature, not crimes that were actually subject to the death penalty.

[7] It is in this respect that the instant case is distinguishable from *United States v. Provenzano*, 423 F.Supp. 662 (S.D. N.Y. 1976) affd 556 F.2d 562 (2d Cir. 1977). There, the federal district court ruled that the legislature's repeal of the death penalty for the crime of kidnapping made that crime one no longer punishable by death and, hence, subject to a time limit on prosecutions. The amendment at issue in *Provenzano*, however, made kidnapping punishable "by imprisonment for any term of years or

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In *Ellis*, this court considered whether capital felony should be held to the five year limit for offenses the punishment for which "is or may be imprisonment" or whether it should be exempt as an offense punishable by death. *See* General Statute 54-193 (Rev. to 1975). At issue in *Ellis*, therefore, was the exact same classification language at issue here, PA73-137, Section 2 (c) codified as General Statutes §53a-54a(c) (Rev. to 1975). *Ellis* interpreted the statute as classifying offenses by their maximum possible penalty for purposes of determining the allowable period of prosecution. *Ellis* held, therefore, that although capital felony was punishable by either death or imprisonment, it remained exempt from the statute of limitations as an offense "punishable by death." Murder, which is similarly classified, must be similarly exempt.[8]

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life." *Id.* at 666. Thus, in Provenzano, unlike here, the legislature clearly removed the offense at issue from the class of capital offenses. Id.

[8] Another section of the General Statutes, which was also repealed and amended by PA73-137, provides further support for according murder and capital felony the same treatment under our statute of limitations. General Statutes §53a-45 (Rev. to 1975), which is the codification of PA 73-137 §1, carries the heading: **"Sec. 53a-45. Murder punishable by death or life imprisonment. Waiver of jury trial. Finding of lesser degree."** The text of § 53a-45 provides, as does §53a-54a(c), that "Murder is punishable as a class A felony unless it is a capital felony and the death sentence is imposed as provided by Section 53a-46a." Although this section heading was not part of the Public Act, this court has recognized that where the meaning of an act is ambiguous, a section heading may serve as an aid in its interpretation. *Algonquin Gas Transmission Co. v. Zoning Board of Appeals*, 162 Conn. 50, 55, 291 A.2d 204 (1971); Singer, *Sutherland Statutory Construction*, §47:14 (6th Ed. 2000). The

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A further indication that the legislature did not change the allowable period of prosecution for murder is the fact that, although PA73-137 amended several provisions of the General Statutes to reflect changes wrought by the new death penalty provisions, it did not amend the statute of limitations in General Statutes §54-193.[9] Had the legislature intended to change the statute of limitations for murder, it is reasonable to assume it would have done so expressly.

This is especially so because to impose a limitation on the prosecution of murder would not only have broken with over 150 years of Connecticut history; *see State v. Ellis*, 197 Conn. at 443-44, 451, 456-57 (recognizing that murder, or at least first degree murder, had never been subject to a limitation period); it would have removed Connecticut from the overwhelming consensus among states that the crime of murder should always be subject to prosecution. "Nearly all statutes of limitations exclude limitation periods for capital offenses and noncapital murder, and many do not limit the time for prosecution of other major offenses." Adelstein, Alan, L., *Article: Conflict of the Criminal Statutes of Limitations with*

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wording of this heading, then, lends further support to the legislature's historic treatment of murder as an offense "punishable by death."

9 The following statutes were expressly repealed and/or amended: PA 73-137 §1 repealing General Statutes §53a-45, and substituting new language); PA 73-137 §5 repealing General Statutes §53a-92 and substituting new language); PA 73-137 §6 (repealing General Statutes §53a-25 and substituting new language); PA 73-137 §7 (repealing subsection (b) of §53a-28 and substituting language); PA 73-137 §8 (repealing subsection (b) of §53a-35 and substituting language); PA 73-137 (repealing §53a-55 and substituting language); PA 73-137 §15 (repealing §53a-46, 53a-54 and 53a-93).

Lesser Offenses at Trial, 37 William and Mary L. Rev. 199, 251-252 (1995) (footnotes omitted); *see also, Comment: Meeting the Statute of Limitations or Beating it: Using "John Doe" Indictments based on DNA to Meet the Statute of Limitations*, 150 U.Pa. L. Rev. 1079, 1088, 1091 (2002) (generally no statute of limitations for murder); *see* Torcia, *Wharton's Criminal Law* (14th ed. 1978) (Supp. 1992) §90, p. 418 ("It is commonly provided that a prosecution for murder or for any offense punishable by death or life imprisonment may be commenced at any time.")

"'In the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language." *State v. Ellis*, 197 Conn. at 459. No language indicating a clear break with 150 years of Connecticut history and the established policy of nearly every state in the union is found in PA73-137.

b. The legislative history of PA 73-137 and PA 76-35 makes clear that the legislature never intended to change the limitation period for murder

The genesis of PA 73-137 is *Furman. v. Georgia*, 408 U.S. 238 (1972) which Connecticut interpreted as invalidating its capital sentencing statutes. *State v. Ailion*, 164 Conn. at 662. In the wake of *Furman*, the Connecticut legislature struggled to pass capital sentencing provisions that would comply with the constitution. Our murder statute was amended in 1973 with a view toward bringing our capital procedures into compliance with constitutional mandates. H-136, 1973 H.P., Vol. 16, Part 6, p. 2925; *see State v. Ross*, 269 Conn. 213, 343 n. 77, A.2d (2004).

The lines drawn by the legislature in designating some murders as capital felonies were drawn to comply with *Furman*; they do not reflect the legislature's diminished abhorrence for other murders. This point is made clear by the discussion surrounding a proposed amendment adding mur-

ders committed in the course of a robbery or burglary to the list of capital felonies. The amendment was disfavored, not because that type of murder was less serious, but because of the fear that its inclusion would render the act unconstitutional. *See* Remarks of Rep. Bingham, 1973 H.P., Vol. 16, Part 6, p. 2929.

Importantly, when the legislature expressly addressed the issue of the allowable period of prosecution for murder, it made clear that murder was, and should remain, exempt from any limitation period. In 1976, the legislature amended the statute of limitations to expressly state that there is no statute of limitations for class A felonies and capital felonies. *See* General Statutes §54-193 (Rev. to 1977). As this court noted in *Ellis*, the legislative history of 1976 Public Act 76-35 (PA 76-35), makes clear that this provision was intended to "clarify" rather than change existing law. *See State v. Ellis*, 197 Conn. at 459-60 citing 19 S. Proc.; Pt 1, 1976 Sess., p. 341 (Remarks of Senator David H. Neiditz). "[A] clarifying act, which 'in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act.'" *State v. Blasko*, 202 Conn. 541, 557, 522 A.2d 753 (1987). Accordingly, in *Golino*, this court viewed the 1976 amendment as a "clear indication that the pre-1976 statute of limitations was not intended to bar a prosecution for murder[.]" *State v. Golino*, 201 Conn. at 445.[10]

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[10] A proper interpretation of the 1976 amendment undermines the actual holding of *Paradise* as well as its underlying assumption. Because the amendment is clarifying in nature, and hence an explication of the meaning of the original act, it was unnecessary for *Paradise* to determine whether it could be applied retroactively. Rather than retrospectively affecting the statute of limitations in effect on the day of this offense, PA 76-35 clarified that murder was exempt under that statute. *See Bhinder v.*

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Thus, the language and legislative history of both PA 73-137 and PA 76-35 make plain that the 1973 legislature did not intend to change the allowable period of prosecution for murder. The new legislation continued to classify murder as an offense punishable by imprisonment or, in certain circumstances, death. Under the teachings of *Ellis* and *Golino*, the allowable period of prosecution under our statute of limitations is determined by the maximum penalty provided, and thus, an offense punishable by either imprisonment or death is a crime punishable by death for purposes of the statute, whether or not the penalty of death is actually available in a particular prosecution. *State v. Ellis*, 197 Conn. at 455; *State v. Golino*, 201 Conn. at 443, 446. Murder thus remained within a category of offenses so atrocious as to be subject to prosecution at any time.

3. Defendant's argument regarding second degree murder is both wrong and irrelevant

Defendant argues that in 1973 our legislature divided murders into two categories for purposes of our statute of limitations: Those that are punishable by death and hence exempt from repose, and those that are subject to a five year limit on prosecutions. DB at 25-26. He contends that Connecticut had recognized a similar division among murders from 1846 until the enactment of the penal code in 1971. Specifically, he claims that when the legislature divided murder into degrees in 1846, it created the offense of second degree murder, designated it noncapital, and subjected it to a limitation period. DB at 23. The implication of defendant's argument is that in creating the offense of capital felony in

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Sun Company, Inc., 263 Conn. 358, 374 n.7, 819 A.2d 822 (2003); *State v. Blasko*, 202 Conn. at 559; *State v. Magnano*, 204 Conn. at 284.

1973 the legislature intended to classify murders into exempt and nonexempt categories as the legislature had supposedly done in 1846. The defendant's argument regarding second degree murder is both wrong and irrelevant.

a. Neither the language of the 1846 Act nor the cases interpreting it suggest it divided murder into two categories for purposes of the statute of limitations

Defendant's argument fails at each juncture. First of all, despite some dicta in *Ellis* and *Golino* to the contrary; *State v. Ellis*, 197 Conn. at 456; *State v. Golino*, 201 Conn. at 445; it is not at all clear that the 1846 amendment to the murder statute effectuated a change in the limitation period. That statute provided as follows:

> Sec. 3. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetration or in attempting to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; *and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty, ascertain in their verdict whether it be murder in the first degree or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.*
>
> Sec. 4. Every person who shall commit murder in the first degree, shall suffer death.

> Sec. 5. Every person who shall commit murder in the second degree, shall suffer imprisonment in the Connecticut State prison during his natural life.

General Statutes, Title 6, Ch. 2, §§3, 4, 5 (Rev. to 1849).

The import of this act was explained in *State v. Dowd*, 19 Conn. 388, 392 (1849): "It is apparent from this statue, that it was not the design of the legislature to create any new offence; *or change the law applicable to murder*, except so far as the punishment was concerned. The crime still remains, as it was at common law; and in the more aggravated cases, the person convicted is liable to the original punishment, while others, whose crimes are less aggravated, are punished with less severity." (emphasis added) As *Dowd* reveals, therefore, the 1846 act sprang from much the same impetus as guided PA 73-137 -- a changing approach toward capital punishment; not a change in the allowable period of prosecution for murder. *See* Wharton, *Criminal Law*, §140 (15th Ed. 1994) (stating that similar Pennsylvania statute was designed to narrow the application of the death penalty).

Further, the italicized portion of this statute requires that a person be indicted and tried for murder, not murder in any particular degree. *Not until conviction* is the degree of the offense determined, either by a jury, or by a judge after hearing witnesses. *See State v. Dowd*, 19 Conn. at 393 (jury found the defendants, charged with murder by poison, guilty of murder in the second degree). Therefore, if the defendant's argument is correct, the appropriate period of prosecution could not be determined until after a conviction. It is axiomatic that statutes are not to be given a construction that results in absurd or unworkable results. *State v. Burns*, 236 Conn. 18, 26-27, 670 A.2d 851 (1996); Singer, *Sutherland Statutory Construction*, §45:12. Defendant's construction is plainly unworkable because neither the state nor the defen-

dant would know, prior to trial, whether the offense of murder was time-barred.[11]

The 1846 amendment is better interpreted the same way *Ellis* interpreted both the 1951 amendment abrogating the mandatory death sentence for first degree murder and the capital felony statute. *See State v. Ellis*, 197 Conn. at 456-58. In each instance, this court recognized that legislation designed to effectuate the state's policy with regard to capital punishment and silent on the issue of repose should not be interpreted as altering a deep-rooted understanding. *Id.* at 457-58. The 1846 legislature desired to ameliorate the harsh penalty of death for some persons convicted of murder, not to grant them a complete defense to their crimes.

Moreover, the absence of such a defense to murder, in any degree, is supported by the absence of case law concerning it. Neither the state, nor apparently the defense, has uncovered any pre-penal code cases in which a statute of limitations defense was asserted for murder. If such a defense existed for over 120 years as defendant contends, one would expect to find instances in which it was asserted.

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[11] Although the General Assembly passed another Act in 1870, requiring that all indictments for murder specify the degree of the crime, the "object of that statute was to give the defendant information from the indictment itself, whether he is to answer to a willful, deliberate, and premeditated murder, or murder of a lower degree." *State v. Hamlin*, 47 Conn. 95, 117 (1879); *Smith v. State*, 50 Conn. 193, 197-99 (1882); Acts of 1870 Ch. 73. This enactment, therefore, did not address the allowable period of prosecution for murder. Moreover, a person indicted for first degree murder could still be convicted of second degree murder by a jury without any opportunity for a defendant to assert or the state to defend against a statute of limitations defense. *See State v. Dowd*, 19 Conn. at 393 (finding that the determination of the degree of the offense is relegated "without any exception or qualification" to the jury).

All of this supports the application of the Ellis/Golino analysis to this early murder statute. An offense punishable by either death or imprisonment, as was the offense of capital felony in *Ellis*, and the offense of murder in 1846, is an offense "punishable by death" for purposes of the statute of limitations.

b. Because second degree murder was the equivalent of modern day manslaughter, not murder, its limitation period is irrelevant

Nevertheless, every if the legislature in 1846 did bring about a change in the period of prosecution for second degree murder, this does not advance defendant's cause. Defendant argues that both murder under General Statutes §53a-54a (Rev. to 1975), and second degree murder under General Statutes, Title 6, Ch. 2, §3 (Rev. to 1849), are "noncapital murders" and that "noncapital murders" have been subject to a statutory limit on prosecution for 120 years. *See* DB at 20. This argument, however, ignores the teaching of *Golino*. Under *Golino*, the period of prosecution is tied to the seriousness of the offense not the actual punishment available. *State v. Golino*, 201 Conn. at 443. The appropriate comparison, then, is between offenses of comparable culpability. Because the common law offense of second degree murder was comparable to present day manslaughter rather than murder, the determination of its period of repose does not inform the inquiry before this court.

Murder in the second degree was not defined in the 1846 statute but simply consisted of all murders not included in the category of first degree murder. At common law, which the 1846 statute did not change; *State v. Dowd*, 19 Conn. at 392; *State v. Jacowitz*, 128 Conn. 40, 20 A.2d 470 (1941); murder was "the unlawful killing of one human being by another with malice aforethought." *State v. McGuire*, 84 Conn. 470, 481, 80 A. 761 (1911). Malice aforethought' denotes various

mental states, including an intent to kill, intent to cause great bodily harm, intent to do an act knowing it will probably cause death or great bodily harm, and an intent to commit an imminently dangerous act regardless of the risk to human life. Wharton's Criminal Law § 139 (15th Ed. 1994) Therefore, because the 1846 Act designated deliberate killings and felony murders as murder in the first degree, other homicides designated murder in the second degree fell into the category of present day manslaughter. *See* General Statutes §53a-55(a) (Rev. to 2003) (manslaughter defined). Thus, the period of repose for second degree murder, if one existed, has no relevance to the question before this court. The only significance of a time limit for second degree murder would be to show the legislature's consistency in imposing a similar restriction on the prosecution of present day manslaughter.

It must be remembered that defendant was convicted of an intentional killing. Intentional killings such as this would always have been recognized as murder in the first degree and, hence, outside any limitation period. General Statutes, Title 6, Chapter 2, §§ 3, 4, 5 (Rev. to 1849) ("All murder which shall be perpetrated by means of poison, or by lying in wait, or *by any other kind of wilful, deliberate, and premeditated killing* . . . shall be murder in the first degree); *State v. Hoyt*, 46 Conn. 330, 336 (1878) (If the jury is satisfied that it had been the deliberate will and intent of the accused to take the life of his victim, they would have grounds for a verdict of murder in the first degree); *State v. Cronin*, 64 Conn. 293, 305 (1894) (to sustain a conviction for first degree murder, there must be evidence of a specific intent to take life, which was formed prior to the act of killing, so that the jury can say that act was wilful, deliberate and premeditated); *State v. Kurz*, 131 Conn. 54, 60 (1944) (murder in the second degree does not require a specific intent to kill); *see also* 1874 Rev. Swift's Digest Ch. III, pp. 294-95 (malice is the essential ingredient in murder, and it is this circumstance which distinguishes murder from every other species of homicide , espe-

cially manslaught . . The plainest cases of express malice are when a delibe. . . intention is evinced to kill a particular individual); *Commission Comments to the Penal Code re: § 53a-54a* (explaining that the penal code eliminated the elements of malice, premeditation and deliberation from the definition of murder because the common law concepts did not clearly denote planning and preparation as long as there was sufficient time to form the intent); Wharton's Criminal Law §141 (15th Ed. 1994) (most common requirement for murder in the first degree is that the actor intended to kill; acting 'purposely' or 'wilfully' is usually equivalent to acting 'intentionally). It is clear, therefore, that this offense would have been exempt from the statute of limitations if committed at any time in Connecticut's history.

For this reason, defendant's reliance on a supposed statute of limitations for second degree murder affords him no advantage. This is especially so because, at the time of this crime, there was no offense of murder in the second degree and, under Golino, it is clear that the post-penal code crime of murder had no limitation. Therefore, whatever the intent of the legislature may have been in 1846, it sheds no light on whether the 1973 legislature intended to impose a time limitation on the prosecution of murder. As previously argued, the clearest expression of intent by the legislature indicates it intended no such change. *See* PA 76-35.

In sum, the changes to our murder statute between the offense in *Golino* and this reflect a changed approach to the death penalty, mandated by *Furman*, not a different view of whether murder should be time barred. Despite the changing scope of capital punishment, our legislature has always held that the intentional taking of human life is a crime so atrocious as to be subject to prosecution at any time.

C. Alternatively, this Court Should Overrule *Paradise* and Apply

A recent decision by the United State Supreme Court undermines the holding of *Paradise*. In *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446 (2003), the United States Supreme Court held that a new statute of limitations cannot revive a previously time-barred prosecution without violating the ex post facto clause of the federal constitution. The holding in *Stogner* is limited to expired prosecutions and the reasoning employed strongly suggests that a new statute of limitations may be applied so long as the original time period has not expired. *See e.g. Stogner*, 123 S.Ct. at 2451. Under *Stogner*, therefore, there is nothing retroactive about the application of an extension of a statute of limitations so long as the original statutory period has not expired. *See Stogner v. California*, 123 S.Ct. at 2453, 2461; *but see State v. Crowell*, 228 Conn. 393, 399, 636 A.2d 804 (1994).

Applying the 1976 Amendment to our statute of limitations to this offense does not offend the Constitution, and should not offend our sense of fairness. The violation of a criminal statute does not confer upon the violator a vested right under the then existing statute of limitations. *State v. O'Neill*, 796 P.2d 121, 125 (Idaho 1990); *Commonwealth v. Johnson*, 553 A.2d 897, 900 (Pa. 1989); *People v. Hodgson*, 740 P.2d 848, 851 (Wash. 1987) *cert. denied sub nom*, *Fied v. Washington*, 485 U.S. 938 (1988); *People v. Sample*, 161 Cal. App. 3d 1053, 1058 (App. Div. 1984).

As Judge Learned Hand stated in *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.) *cert. denied*, 277 U.S. 590 (1928):

> [T]he question is one of degree and depends upon whether the result [is] harsh and oppressive. Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease on life. The question turns

> upon how much violence is done to our instinctive feeling of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But while the chase is still on, it does not shock us to have it extended beyond the time first set, or if it does, the stake forgives it.

Although this Court rejected a similar argument by the state in *State v. Crowell*, *supra*; the state asks this Court to reconsider and overrule the retroactivity analysis of *Paradise*. *See* State's Br. in Sup. Ct. Rec. and Br. *State v. Crowell*, S.C. 14478 (reproduced in SA at A98-109); *see also Roberts v. Caton*, 224 Conn. 483, 492, 619 A.2d 844 (1993) (extending civil statute of limitations).

* * * *

THE STATE OF CONNECTICUT

By /s/
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June 23, 2004

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APPENDIX G

S.C. 16844		
State Of Connecticut	:	**Supreme Court**
	:	
v.	:	
	:	
Michael C. Skakel	:	**February 14, 2006**

MOTION FOR RECONSIDERATION, TO REARGUE AND FOR RECONSIDERATION AND REARGUMENT EN BANC

Pursuant to §§ 70-7 and 71-5 of the Connecticut Practice Book, the Defendant, Michael C. Skakel, through his undersigned counsel, hereby moves this Court for reconsideration, for reargument, or for reconsideration and reargument en banc. Reconsideration and/or reargument en banc is necessary principally because this Court's decision violates the ex post facto and due process clauses of the United States Constitution (and the due process clause of the Connecticut Constitution) by upholding Mr. Skakel's conviction on a criminal charge that was time-barred for twenty-three years under the statutory law of this State, as authoritatively construed by the Court itself in State v. Paradise, 189 Conn. 346 (1983). The Court evidently failed to consider the grave constitutional implications arising from the retroactive application of its new statutory construction to defendant. We respectfully submit that reconsideration and reargument should be granted if this Court is to honor its highest traditions.

I. BRIEF HISTORY OF THE CASE

There is no question at this point that Michael Skakel was charged, tried and convicted in a criminal prosecution that was unlawful under the 1983 holding of this Court in State v. Paradise. Despite the fact that the prosecution was time-barred, Mr. Skakel was arrested and charged on January 19, 2000 for the October 30, 1975 murder of Martha Moxley in Greenwich, Connecticut. Mr. Skakel, who was thirty-nine years old on the date of his arrest, initially was presented in juvenile court because he was fifteen years old at the time of the homicide. The juvenile court (Dennis, J.) granted the State's motion to transfer the matter to the regular criminal docket because of Mr. Skakel's age. Once the matter was transferred, Mr. Skakel moved to dismiss the case under the applicable five-year statute of limitations and the direct authority of State v. Paradise, 189 Conn. 346 (1983). The trial court (Kavanewsky, J.) denied the motion to dismiss.

On June 7, 2002, following a month-long jury trial, Mr. Skakel was convicted of murder in violation of Conn. Gen. Stat. § 53a-54a (Rev. to 1975). He was sentenced to a term of incarceration of twenty years to life in accordance with the 1975 adult sentencing laws. Mr. Skakel's appeal was argued before this Court on January 14, 2005. On January 24, 2006, this Court issued its decision denying each of Mr. Skakel's claims on appeal and affirming the conviction. State v. Skakel, 276 Conn. 633 (2006).

II. SPECIFIC FACTS AND LEGALS GROUNDS FOR REQUESTING RECONSIDERATION AND REARGUMENT

A. This Court's Application of Its Statute of Limitations Ruling Violates Mr. Skakel's Constitutional Ex Post Facto and Due Process Rights

In State v. Skakel, 276 Conn. 633 (2006), this Court held that Mr. Skakel's prosecution was permissible under a 1976

Connecticut statute eliminating any limitations period for non-capital murder.[1] In so holding, this Court expressly

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[1] The Court's determination that this prosecution was not time-barred by the applicable statute of limitations is based upon an analysis different than that of the trial court. Skakel, 276 Conn. at 663. The trial court concluded that the instant murder prosecution was not subject to the statute of limitations set forth in Section 54-193 (Rev. to 1975) because murder historically was considered a grave offense to which the statute of limitations was never intended to apply. The retroactive application of the 1976 amendment to the statute of limitations was ***never*** argued or presented by the State to the trial court. In fact, in its Memorandum In Opposition To Motion To Dismiss filed on May 30, 2001, the State conceded that it could ***not rely*** on a claim for retroactive application of the 1976 amendment, and it ***never*** argued that Paradise should be reversed. See State's Memorandum In Opposition To Motion To Dismiss, Appendix at A1.

Thus, Mr. Skakel's brief-in-chief to this Court solely addressed the trial court's analysis and argued that the trial court misread this court's established precedent, and disregarded the historical difference between capital murder (murder in the first degree, which was never time-barred) and non-capital murder (murder in the second degree, which was time-barred). For sixteen pages, the State's brief to this Court also focused on the trial court's finding that there never was a statute of limitations for murder. Then, in one page at the end of its argument, the State alternatively requested this Court to overrule Paradise. See State's Brief, at 11-27. The State had never raised the issue in the trial court or filed a preliminary statement of the issues that included alternate grounds upon which the judgment could be affirmed. See Thomas v. City of West Haven, 249 Conn. 385 (1999) (appellee has duty to raise the issue in trial court). Mr. Skakel responded to the State's new claim in three-quarters of a page of his 25-page reply brief. Although this Court then overruled long-standing precedent and issued a lengthy opinion addressing the ret-

[Footnote continued on next page]

overruled its own twenty-three-year-old decision in State v. Paradise, 189 Conn. 346 (1983), which had held that the same 1976 statute did *not* apply retroactively and did *not* permit prosecution of a 1975 non-capital murder. The result of this Court's about-face was to uphold a murder prosecution that, under pre-existing Connecticut statutory law as authoritatively announced by the state's highest court, had been time-barred for at least twenty years. Under the controlling precedents of the United States Supreme Court, this Court's reversal of longstanding Connecticut law violated the Ex Post Facto Clause of Section 10 of Article I of the United States Constitution and the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 8 of the Connecticut Constitution.

1. The 1976 Amendment to the criminal statute of limitations, as reinterpreted by this Court and retroactively applied to Mr. Skakel, violates the Ex Post Facto Clause of the United States Constitution

The principle that governs this case is clear and can be stated in few words: "the *Ex Post Facto* Clause forbids resur-

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[Footnote continued from previous page]

roactivity of the 1976 amendment, it did so without the benefit of either party's analysis on the issue.

Additionally, in its decision, this Court incorrectly summarized the State's arguments: the State did not argue Paradise should be overruled and alternatively argue that the trial court's determination that there never was a statute of limitations for murder should be affirmed. See Skakel, at 666. The State, in fact, presented its arguments in reverse. Its central argument was that the trial court correctly decided there was no statute of limitations for murder, and its alternative argument, ***presented for the first time and with little analysis***, was that Paradise should be overruled.

rection of a time-barred prosecution." Stogner v. California, 539 U.S. 607, 616 (2003).[2] The reasons behind this principle are evident. As the Court stated in Stogner, "extending the limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest,'" *Stogner*, 539 U.S. at 611 (quoting Falter, 23 F.2d at 426), deprives "the defendant of the 'fair warning' . . . that might have led him to preserve exculpatory evidence," id. 611 (quoting Weaver v. Graham, 450 U.S. 24, 28 (1981)) and "'makes that a punishable offense which was previously a condoned and obliterated offense.'" Id. at 613 (quoting H. Black, Constitutional Prohibitions Against Legislation Impairing the Obligation of Contracts, and Against Retroactive and Ex Post Facto Laws § 235 at 298 (1887)).

As the Court recognized in Stogner, statutes of limitation give rise to vested rights of reliance. "'The statute [of limitations] is . . . an amnesty, declaring that after a certain time . . . the offender shall be at liberty to return to his country . . . and . . . may cease to preserve the proofs of his innocence.'" 539

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[2] See, e.g., United States v. Madia, 955 F.2d 538, 540 (8th Cir. 1992); United States v. Richardson, 512 F.2d 105, 106 (3rd Cir. 1975); Falter v. United States, 23 F.2d 420, 426 (2d Cir. 1927) (Hand, J.), cert. denied, 277 U.S. 590 (1928); People ex rel. Reibman v. Warden, 242 A. D. 282, 285, 275 N. Y. S. 59, 62 (App. Div. 1934); People v. Shedd, 702 P.2d 267, 268 (Colo. 1985) (en banc) (per curiam); State v. Hodgson, 108 Wash. 2d 662, 667-669, 740 P.2d 848, 851-852 (1987) (en banc), cert. denied, 485 U.S. 938 (1988); *State v. Nunn*, 244 Kan. 207, 218, 768 P.2d 268, 277-278 (1989); *State v. O'Neill*, 118 Idaho 244, 247, 796 P.2d 121, 124 (1990); State v. Hirsch, 245 Neb. 31, 39-40, 511 N.W.2d 69, 76 (1994); State v. Schultzen, 522 N.W.2d 833, 835 (Iowa 1994); State v. Comeau, 142 N. H. 84, 88, 697 A.2d 497, 500 (1997); Santiago v. Commonwealth, 428 Mass. 39, 42, 697 N.E.2d 979, 981, cert. denied, 525 U.S. 1003 (1998).

U.S. at 611 (quoting F. Wharton, Criminal Pleading and Practice § 316 at 210 (8th ed. 1880)). Re-opening a prosecution long after the pre-existing limitations period has expired is "arbitrary" and "potentially vindictive," allowing a defendant to be convicted of a crime well after "memories [have] fade[d] and witnesses [have] die[d] or disappear[ed]." Id. at 611, 631. Reviving a time-barred prosecution "inflict[s] punishments where the party, by law, was not liable to any punishment." Stogner, 539 U.S. at 611 (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798)). It is thus "manifestly *unjust and oppressive*" and a violation of the Ex Post Facto Clause. Id. at 613 (original emphasis) (quoting Calder, 3 U.S. (3 Dall.) at 389).

For all these reasons, this Court's decision in this case – which, according to its own reasoning, resurrected a prosecution time-barred under Connecticut law from 1983 to 2006 – is plainly unconstitutional. Twenty three years ago, in *Paradise*, this Court, as the highest judicial authority in the state and hence the final arbiter of statutory meaning, authoritatively determined: (*i*) that the 1976 amendment to Conn. Gen. Stat. § 54-193 did *not* apply retroactively; and (*ii*) that the five-year limitations period in the pre-1976 version of § 54-193 applied to a non-capital murder committed in 1975. State v. Paradise, 189 Conn. 346 (1983). Hence as of 1983, under the statutory law of Connecticut, as authoritatively adjudicated by the state's highest court, a prosecution for the 1975 non-capital murder at issue in this case was time-barred.

Now, twenty-five years later, this Court has reversed itself, holding that the 1976 amendment to § 54-193 *does* apply retroactively; and that, so construed, § 54-193 *does* permit a prosecution for a 1975 non-capital murder, even though under Paradise such a prosecution was deemed unlawful. Thus, the 1976 amendment to § 54-193, as today reinterpreted by this Court, has "resurrected a time-barred prosecu-

tion" – violating the unequivocal prohibition of the Ex Post Facto Clause.

The stark illegality arising from the retroactive application of this Court's new construction of statutory law cannot be avoided by characterizing the Court's reasoning in Paradise as merely an unfortunate error. Skakel, 276 Conn. at 693. That assertion, while candid, is constitutionally irrelevant. Preexisting law does not magically disappear for ex post facto purposes simply because it is later revoked as a regrettable error. This prosecution cannot be saved by arguing that Paradise should have been decided differently in 1983, or that had the Court construed the statute differently the first time, the prosecution of Mr. Skakel would have been constitutionally permissible. The simple fact is that the statutory law in this State between 1983 and 2006, as it applied to the prosecution of Michael Skakel for the 1975 murder of Martha Moxley, was precisely what this Court said it was at that time, on indistinguishable facts, in the Paradise case. It is "emphatically the province and duty of the judicial department to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1804), and in Paradise, this Court said what the statutory law of this state was in terms that could not have been clearer or more directly applicable to this case: as of 1983, the statute of limitations for a 1975 non-capital murder had expired. Applying § 54-193 in 2006 to resurrect a 1975 prosecution is therefore "manifestly unjust and oppressive," a denial of the constitutionally required "fair warning," a breach of defendant's vested rights, and a violation of the Ex Post Facto Clause.

Labeling the Court's Paradise decision an "error" thus does nothing to remove the constitutional impediment to retroactive application of the newly announced construction of the statute. A statute construed to change its effect in this manner violates the Ex Post Facto Clause, no matter how it is labeled. "The Constitution deals with substance, not shad-

ows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." Cummings v. Missouri, 71 U.S. 277, 325 (1867).

It is important to understand that Paradise did ***not*** involve an instance of mere common-law adjudication,[3] but rather engaged this Court in the task of construing a statute, Conn. Gen. Stat. § 54-193. The protection conferred by the Ex Post Facto Clause should be especially strong here due to the dual nature of the governmental authority behind the statutory rule announced in Paradise -- a rule of law enacted by the legislative branch and accorded a definitive construction by the judicial branch.[4] The constitutional Ex Post Facto Clause confers upon Connecticut's citizenry, including Mr. Skakel, the entitlement to rely with confidence on those legal rules enacted by the legislature and construed by the highest court in this State. Such confidence can be expected to reach its highest point in a case like the present one, moreover, because the factual and legal context in which this Court decided the meaning of Conn. Gen. Stat. § 54-193 in

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[3] Compare Rogers v. Tennessee, 532 U.S. 451 (2001) (ex post facto clause does not apply, of its own force, to judge-made changes to the common law as opposed to statutes).

[4] While the Ex Post Facto Clause "is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government," Marks v. United States, 430 U.S. 188, 191 (1977) (clause not directly applicable to Supreme Court's constitutional decisions), it is established beyond cavil that where a court in a criminal case reads a statute to impose impermissible retroactive effects, the Ex Post Facto Clause can be violated. E.g., Carmell v. Texas, 529 U.S. 513 (2000); Lynce v. Mathis, 519 U.S. 433 (1997). That is precisely what occurred here.

Paradise is identical to the operative facts and law here. Indeed, for constitutional purposes, the Paradise court directly addressed every citizen who might become Michael Skakel when it explicitly acknowledged that its decision would "directly affect a number of unsolved class A felonies." State v. Paradise, 189 Conn. 346, 353 (1983). These words were not simply a prediction; they reflected a constitutional promise that cannot be later revoked.

By reversing its twenty-three year old interpretation of Conn. Gen. Stat. § 54-193, this Court in 2006 construed that statute to resurrect a prosecution that had been time-barred for decades under the authoritatively established statutory law of Connecticut. This Court then applied its new decision on the retroactivity of Conn. Gen. Stat. § 54-193 retroactively. So construed and so applied, Section 54-193 plainly violates the Ex Post Facto Clause of the United States Constitution.

2. This Court's retroactive resurrection of a time-barred prosecution violated the due process clauses of the state and federal constitution

"[L]imitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process." Rogers v. Tennessee, 532 U.S. 451, 456 (2001); Marks v. United States, 430 U.S. 188 (1977) (due process prohibited Supreme Court decision reversing precedent from being retroactively applied against defendant in criminal case); Bouie v. City of Columbia, 378 U.S. 347 (1964) (due process prohibited state supreme court decision reinterpreting statute from being retroactively applied against defendant in criminal case). Accordingly, this Court's doubly retroactive decision in this case – overruling its own earlier decision in Paradise and on that basis applying § 54-193 retroactively against Mr. Skakel – also violated due process. See U.S. Const., amend. XIV; Conn. Const., art. I, § 8.

The "basic" principle required by the Due Process Clause is "fair warning." Rogers, supra, 532 U.S. at 457. When an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law." Bouie, 378 U.S. at 355; Douglas v. Buder, 412 U.S. 430, 432 (1973); Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617 (Cal. 1970); State v. McGann, 199 Conn. 163, 506 A.2d 109 (Conn. 1985).[5]

Under these principles, this Court's decision in this case was plainly unconstitutional. As the United States Supreme Court recently stated in *Stogner*, the resurrection of a time-barred prosecution "deprives the defendant of . . . fair warning." Stogner, 539 U.S. at 611. Hence "a retrospective judicial determination that effectively changes the statute of limitation and revives a previously barred criminal prosecution is in the nature of an ex post facto law and thus violates the defendant's right to substantive due process." Hunt v. Tucker, 875 F. Supp. 1487, 1509 (N.D. Ala. 1995) (emphasis added), aff'd, 93 F.3d 735 (11th Cir. 1996).

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[5] It is immaterial to the due process analysis that this Court has said that statutes of limitation are no longer to be deemed "penal statutes" for purposes of state-law canons of construction. Skakel, 276 Conn. at 675-76. The Due Process foreseeability test is a matter of federal constitutional law; it is unaffected by a state court's determination that a particular statute is or is not "penal" for state-law purposes. See, e.g., Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. Tex. 1988) (effort to characterize as "procedural" judiciary's alteration of preexisting doctrine barring multiple prosecutions for single transaction could not circumvent Due Process Clause). Under Bouie, a retroactive state court decision must satisfy the foreseeability test if its effect is to "subject a person to criminal liability for past conduct," 378 U.S. at 355, which is precisely the effect of this Court's decision in this case.

It is certain that due process was violated here because this Court reached its result by overruling its own earlier decision in Paradise. A state-court overruling of settled, controlling precedent is "constitutionally unforeseeable" ***as a matter of law***. Moore v. Wyrick, 766 F.2d 1253, 1257 (8th Cir. 1985); see also Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988) (Texas court's reversal of longstanding "carving doctrine" could not be applied retroactively if preexisting doctrine would have barred defendant's prosecution); Comm. v. Davis, 760 A.2d 406 (Pa. Super. 2000) (state supreme court's overruling of precedent unforeseeable under Bouie); People v. Martinez, 20 Cal. 4th 225 (Cal. 1999) (retroactive application of overruling of precedent would be unconstitutional under Bouie); Ex Parte McAtee, 586 S.W.2d 548 (Tex. Ct. Crim. App. 1979); State v. Saylor, 216 N.E.2d 622 (Ohio 1966); Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972) (overruling of agency decisions could not be applied retroactively under Bouie).

When, in a criminal case, a state court overturns its own precedent and applies a new interpretation of a statute retroactively against the defendant, it is wholly "irrelevant" – in the words of the United States Court of Appeals for the Eighth Circuit – that the state court's new decision might have been defensible if considered as a matter of "first impression," by reference to the statutory language at issue or the law of other jurisdictions:

> [T]he state claims that the plain language of the statute provided [defendant] with fair warning that his conduct might, under these circumstances, be considered felony murder. The state's argument would be persuasive had Moore's case presented a question of first impression in Missouri. However, in light of *State v. Majors* [the case reversed by the state supreme court in upholding defendant's con-

> viction], which narrowed the scope of the felony murder statute, *we are not confronted with the statute "as written" but rather as judicially construed.* As such, whether or not the plain language of the statute would, absent prior judicial construction, give Moore fair warning that his conduct might constitute felony murder is irrelevant. Instead, we must determine whether the expanded scope of the Missouri felony murder statute *was foreseeable in light of its previously narrow construction.*

Moore, 766 F.2d at 1257-58 (emphasis added). See also id. at 1258 ("in light of prior unquestioned Missouri authority directly on point, it cannot reasonably be argued that cases from other jurisdictions supply the fair warning that is constitutionally required by the due process clause").

The appellate court in Moore emphasized several factors as particularly important in establishing that the state supreme court's decision was "constitutionally unforeseeable" under the Due Process Clause. First, "the state supreme court recognized that State v. Majors [the overturned decision] was indistinguishable from the present case." Id. at 1257. Moreover, "the state supreme court recognized that no case other than Majors had presented the precise question involved and then specifically overruled Majors." *Id.* Finally, "no case arising between *Majors* and [the instant case] undermined the authority of Majors." Id.

Every one of these factors applies with equal or greater force here. First, the decision being reversed – Paradise – was "indistinguishable" from the present case. See Skakel, 276 Conn. at 668. Moreover, no case since *Paradise* presented the "precise question involved" and this Court in Skakel "specifically overruled" Paradise. Id., at 670-72. Finally, here too, no case intervening between Paradise and

Skakel had undermined Paradise. Id., at 670 ("In State v. Crowell, 228 Conn. 393, 398-99, 636 A.2d 804 (1994), we expressly reaffirmed our conclusion in Paradise that criminal statutes of limitation are accorded prospective effect only).

Even the decisions of the United States Supreme Court, when they expressly overrule past precedent, cannot be retroactively applied against criminal defendants without violating Bouie. See, e.g., Marks v. United States, 430 U.S. 188 (1977); United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975). In Sherpix, defendants were charged with distributing obscenity at a time when the then-prevailing First Amendment rules on obscenity were governed by the Supreme Court's Roth-Memoirs test.[6] By the time defendants came to trial, the Supreme Court had overruled Roth and established the Miller test.[7] The trial court applied the new Miller standard to defendants' case, but the District of Columbia Circuit reversed, holding that under Bouie, the Supreme Court's overruling of prior doctrine could not be applied retroactively without violating due process.

Significantly, the District of Columbia Circuit in no way suggested that the Supreme Court's Miller test was somehow "indefensible" in its own right – for example, by reference to the text of the First Amendment. On the contrary, the circuit court accepted, as it was bound to do, that the Supreme Court's Miller case properly and reasonably set forth the correct interpretation of the freedom of speech. Nevertheless, because *Miller* had expressly overturned Roth, the circuit court held that Miller was "unforeseeable" for Bouie pur-

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[6] See Roth v. United States, 354 U.S. 476 (1957); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

[7] See Miller v. California, 413 U.S. 15 (1973).

poses and could not be applied retroactively. Sherpix, 512 F.2d at 1366.[8]

For the foregoing reasons, this Court's decision – retroactively overruling its own past precedent and thereby construing a state statute to revive a prosecution time-barred for decades under the pre-existing, authoritatively determined law of Connecticut – has plainly violated both due process and ex post facto principles and must be reversed.

B. This Court Erred In Concluding That Mr. Skakel Was Properly Transferred From The Juvenile Court To The Adult Criminal Division Of The Superior Court

1. This Court improperly utilized an administrative regulation to abrogate rights conferred on Mr. Skakel by statute

This Court's resolution of all three of the issues raised by Mr. Skakel relating to the transfer of his case from juvenile court to the regular criminal docket is based entirely upon an administrative regulation promulgated by the Department of Children and Families ("DCF") in 1994. The regulation provides:

> As used in Sections 17a-145-48 to 17a-145-99, except as otherwise provided therein:
>
> (e) "Child" means any person under eighteen years of age not related to the owner of the child care facility.

Regs. Conn. State Agencies § 17a-145-48. This Court interpreted that regulation to mean that anyone over the age of

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[8] The Sherpix court's reasoning was subsequently approved by the United States Supreme Court in Marks, supra.

eighteen is not considered a "child," and thus is not within the jurisdiction of the DCF. State v. Skakel, 276 Conn. at 660 & n. 24.

This Court relied on the 1994 DCF regulation to conclude that: (1) even though the mandatory investigation under Conn. Gen. Stat. § 17-66 (Rev. to 1975) was not completely performed in this case, it is of no consequence because the DCF regulation required Mr. Skakel to be transferred to the adult docket simply because of his age; (2) the juvenile court properly relied on this 1994 regulation at the time of the transfer hearing even though it was not in place in 1975 because the transfer statute required the juvenile court to look at current options for placement rather than options that may have existed in 1975; thus, because Mr Skakel was over eighteen, there were no current options available to him for placement at the time of transfer; and (3) the juvenile court was not required to consider out of state placement of Mr. Skakel because the court could only consider placement for those persons committed, admitted or transferred to the DCF; because Mr. Skakel was over eighteen, the DCF had no jurisdiction over him and could not place him anywhere, including out-of-state facilities. State v. Skakel, 273 Conn. at 660-62.

In so ruling, this Court improperly relied on the DCF regulation and erroneously determined that Mr. Skakel's age alone mandated his transfer to the adult docket. The Court ignored Mr. Skakel's argument on appeal that an administrative regulation should not be permitted to trump a statute enacted by the legislature. See Def.'s Br. at 17. The applicable commitment statute, Conn. Gen. Stat. § 17-68 (Rev. to 1975), is completely silent as to what is to occur if a delinquent is over the age of eighteen when he is arrested for a crime committed while a juvenile. Despite this silence, this Court relied on a subsequently-enacted administrative regulation to conclude that anyone over the age of eighteen cannot be

committed as a juvenile delinquent under Conn. Gen. Stat. § 17-68, even if the crime were committed as a juvenile.

In effect, the DCF regulation relied upon by this Court completely abrogates a right conferred upon Mr. Skakel by the legislature: the right to juvenile status. By virtue of the 1975 juvenile delinquency statutes, the legislature created a right to juvenile status for Mr. Skakel, who was charged with committing a crime while under the age of sixteen.[9] This right to juvenile status included benefits such as a determination of delinquency rather than criminality, confidentiality, limitations with respect to sentencing, erasure of files, and isolation from the adult criminal population. State v. Angel C., 245 Conn. 93, 103 (1998). However, because Mr. Skakel was not arrested until after the age of eighteen, the DCF regulation relied upon by this Court wholly deprived him of all of the rights that would have been available to him had he been apprehended in a timely manner while still under the age of eighteen.

For example, under the 1975 statutory scheme, Mr. Skakel was afforded a transfer hearing pursuant to Conn. Gen. Stat. § 17-60a (Rev. to 1975) before being transferred to the adult docket. Pursuant to that hearing, in order to transfer Mr. Skakel to the adult criminal division, the juvenile court was required to find:

> (1) the child committed the act for which he is charged and (2) there is no state institution designed for the care and treatment of children

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[9] The right to juvenile status is not created directly by the United States or Connecticut Constitutions. See State v. Angel C., 245 Conn. 93, 104 (1998). Any special treatment accorded to a juvenile because of his or her age results from statutory authority rather than from any inherent or constitutional right. Id. at 104-05.

> to which said court may commit such child which is suitable for his care and treatment or (3) the safety of the community requires that the child continue under restraint for a period extending beyond his majority and (4) the facilities of the superior court provide a more effective setting for disposition of the case and the institutions to which said court may sentence a defendant are more suitable for the care or treatment of such child.

Conn. Gen. Stat. § 17-60a (Rev. to 1975). The central issue under consideration by the juvenile court in this case was the second statutory factor, namely, whether there was a state institution to which the juvenile court could commit him. State v. Skakel, 273 Conn. at 660. However, by operation of the 1994 DCF regulation, Mr. Skakel would never have been able to prove that there was an institution to which he may have been committed pursuant to the second statutory factor. Thus, the application of the 1994 DCF regulation effectively made it impossible for Mr. Skakel, who was not arrested until he was thirty-nine years old, to remain within the jurisdiction of the juvenile court. A transfer hearing under § 17-60a was absolutely unwinnable by application of the 1994 DCF regulation, thus stripping Mr. Skakel of his right to juvenile status that was conferred by the legislature.

Further, the application of the 1994 DCF regulation abridged another statutory right conferred upon Mr. Skakel by the legislature, namely, the right to a complete investigation under Conn. Gen. Stat. § 17-66 prior to transfer to the adult docket. This Court concluded that the § 17-66 investigation was mandatory and that it was not properly completed by the juvenile court in this case. State v. Skakel, 276 Conn. at 660. However, this Court determined that the juvenile court's failure to accomplish the required statutory investigation was of no consequence because, pursuant to the 1994

DCF regulation, Mr. Skakel was required to be transferred to adult court due to his age, regardless of what the investigation showed. *Id.* Therefore, the 1994 DCF regulation rendered Mr. Skakel's statutory right to a complete investigation under § 17-66 a nullity.

The 1994 DCF regulation is the only basis upon which this Court concluded that because the Defendant was over the age of eighteen, he was not within the jurisdiction of the DCF and, thus, transfer to the adult docket was required. The 1975 juvenile statutes do not compel such a result as they are silent as to the procedure that is to be employed when a juvenile defendant is not apprehended until after the age of eighteen. Therefore, this Court improperly permitted an administrative regulation to abridge rights conferred upon Mr. Skakel by statute.

It is well settled that an administrative regulation that alters, abridges, enlarges or modifies a statute is beyond the power of an agency to enact. Alcorn ex. rel. Baskin v. Bartlett, 13 Conn. Supp. 463, 1945 WL 638, at *5 (1945). A regulation that imposes additional requirements beyond those contained in a statute cannot be effective to override the statute. Id. (citing Hammerberg v. Holloway, 131 Conn. 616, 621 (1945)); see also 30 Op. Atty Gen. 135 (Mar. 24, 1958) (administrative rule or regulation may not amend, alter, enlarge or restrict terms of a legislative enactment); 29 Op. Atty. Gen. 143 (Jan. 12, 1956) (same). When a statute and a regulation conflict, the statute must prevail. Comm'r of Admin. Servs. v. Gerace, 40 Conn. App. 829, 834 (1996). This Court's decision in permitting the 1994 DCF regulation to abridge Mr. Skakel's statutory rights is therefore contrary to established law.[10]

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[10] As discussed supra in Footnote 9, because Mr. Skakel's right to juvenile status is statutory rather than constitutional, the right may be lim-

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2. This Court's improper reliance on the 1994 DCF regulation violated Mr. Skakel's state and federal constitutional rights to due process of law

The improper application of the 1994 DCF regulation deprived Mr. Skakel of due process of law as guaranteed by the federal and state constitutions. See U.S. Const., amend. XIV; Conn. Const., art. I, § 8. Courts have recognized that particular state statutes may create a liberty interest in juvenile status. Kent v. United States, 383 U.S. 541, 556-57 (1966); State v. Angel C., 245 Conn. 93, 104 (1998); State v. Skakel, 276 Conn. at 658. Connecticut's 1975 juvenile statutes created such a liberty interest in the Defendant, as the statutes provided for mandatory, exclusive, and original jurisdiction in the juvenile court. State v. Skakel, 276 Conn. at 658-69; Conn. Gen. Stat. § 17-59 (Rev. to 1975). Transfer from the juvenile court in 1975 could only occur after a hearing in which certain criteria were established. Conn. Gen. Stat. § 17-66 (Rev. to 1975).[11] As a result of the juvenile

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ited or withdrawn. See State v. Angel C., 245 Conn. at 105. However, any limitations on this statutory right may necessarily only be imposed by the legislature, not by an administrative regulation.

[11] In contrast to the 1975 juvenile statutes, Connecticut's current statutory scheme does not create a liberty interest in juvenile status for juveniles charged with a capital felony, Class A or B felony, or arson murder. See State v. Angel C., 245 Conn. at 104. This is because the present-day transfer statute provides for mandatory transfer to the adult docket without a hearing for juveniles charged with such crimes. Id. at 96 n.1 (quoting Conn. Gen. Stat. § 46b-127(a)). The juvenile court never obtains exclusive jurisdiction over those juveniles charged with the enumerated crimes and, thus, the juveniles have no vested right to juvenile status. Id. at 108-09. In contrast to the current statutory scheme, the 1975 juvenile

[Footnote continued on next page]

court's original and exclusive jurisdiction pursuant to the 1975 statutes, Mr. Skakel had a vested right to juvenile status. Cf. State v. Angel C., 245 Conn. at 106-09.

A liberty interest in juvenile status created by statute cannot be taken away without due process of law. Kent v. United States, 383 U.S. at 557; see also State v. Angel C., 245 Conn. at 106 ("[I]f a statute vests a juvenile with the right to juvenile status, then that right constitutes a liberty interest, of which the juvenile may not be deprived without due process, i.e., notice and a hearing."). In the present cast, Mr. Skakel was denied due process of law in that the transfer hearing pursuant to § 17-60a was unwinnable by virtue of the application of the 1994 DCF regulation. It is well settled that in order to satisfy the constitutional requirement of due process, the process afforded to a citizen must be meaningful. Bell v. Burson, 402 U.S. 535, 541-42 (1971) ("The hearing required by the Due Process Clause must be meaningful."); State v. Long, 268 Conn. 508, 525 (2004) ("The fundamental requisite of due process of law is the opportunity to be heard ... [which] must be at a meaningful time and in a meaningful manner."). Because the application of the 1994 DCF regulation rendered the transfer hearing an utterly meaningless exercise in that Mr. Skakel would never have been able to meet the second statutory factor set forth in § 17-60a, Mr. Skakel was deprived of his liberty interest in his juvenile status without due process of law.

Mr. Skakel was further deprived of his liberty interest in his juvenile status without due process of law in that the

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[Footnote continued from previous page]

statutes did not provide for such mandatory transfer, thus vesting a right to juvenile status in all persons who committed a crime under the age of 16.

mandatory investigation required under § 17-66 in transfer hearing situations was not fully performed. This Court's affirmance of the juvenile court's application of the 1994 DCF regulation effectively eliminated Mr. Skakel's right to a complete and full investigation as required under § 17-66. Without the thorough completion of this mandatory investigation, Mr. Skakel was not provided the full process afforded by law prior to the deprivation of his liberty interest in his juvenile status.

In effect, this Court's application of the 1994 DCF regulation afforded Mr. Skakel a hearing under § 17-60a that he could not win, and allowed him an investigation under § 17-66 that he could not have. Because this result clearly offends due process, Mr. Skakel's Motion For Reconsideration And Reargument should be granted.

3. This Court's improper reliance on the 1994 DCF regulation violates the Ex Post Facto Clausé of the United States Constitution

This Court's affirmance of the juvenile court's retrospective application of the 1994 DCF regulation violates the Ex Post Facto Clause. The Ex Post Facto Clause prohibits any statute "which makes more burdens ome the punishment for a crime, after its commission." Beazell v. Ohio, 269 U.S. 167, 169 (1925); United States v. Juvenile Male, 819 F.2d 468, 470 (4th Cir. 1987); see also U.S. Const., art. I, § 10. The application of the 1994 DCF regulation violates the Ex Post Facto Clause because it imposed a greater, more burdensome and more onerous punishment than the law in effect at the time the crime was committed.[12] Had Mr. Skakel been adjudged delinquent under the law in effect in 1975, he

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[12] Administrative regulations have the force of law. Teresa T. v. Ragaglia, 272 Conn. 734, 751 (2005).

would have been sentenced to at most four years. See Conn. Gen. Stat. § 17-69(a)-(b) (Rev. 1975). However, because the 1994 regulation was retrospectively applied to him and he was thus transferred to the adult criminal division of the superior court, Mr. Skakel was sentenced to 20 years to life. This dramatic retrospective increase in the punishment for the crime violates the Ex Post Facto Clause.

The 1994 DCF regulation cannot be interpreted merely as a procedural mechanism that is allowed to be applied retroactively. The regulation "is 'procedural' only in the most superficial, formal sense." United States v. Juvenile Male, 819 F.2d at 471.

> [Application of the regulation] is no mere change in venue ...; it is instead a means by which to impose on certain juveniles the harsher sentences applicable to adults. ... The significance is that the transferred defendant is suddenly subject to much more severe punishment. Only by closing one's eyes to the actual effect of the transfer can one label this radical increase in the applicable punishment a procedural change. ... If applied to [Mr. Skakel] retroactively, the [regulation] would have the undisputed effect of increasing the applicable punishment. ... [T]his change can only be characterized as substantive.

Id.;[13] see also United States v. Baker, 10 F.3d 1374, 1394-95 (9th Cir. 1993), overruled on other grounds, United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000) (holding that applying amended transfer statute retroactively violated the Ex Post Facto Clause because it exposed juvenile to a much more severe sentence); In re Daniel H., 237 Conn. 364, 376 (1996) (substantive change in juvenile law is to apply prospectively only).

Because the 1994 regulation affected the severity of the punishment applied to Mr. Skakel by mandating his transfer from juvenile court, the regulation is a substantive law that should not have been retrospectively applied to Mr. Skakel. This retroactive application violated the Ex Post Facto Clause and Mr. Skakel's Motion For Reconsideration And Reargument should be granted.

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13 In United States v. Juvenile Male, the defendant was arrested for the murder of three relatives which took place in 1981 when the defendant was 15 years old. The authorities lost track of the defendant and did not arrest him until 1986, when he was 20 years old. In the interim, Congress amended the Juvenile Delinquency Act to provide that individuals who commit certain crimes at the age of 15 may be prosecuted as adults. The district court applied this amendment to the defendant retroactively, ruling the amendment a procedural change in the law. The Fourth Circuit reversed, holding that the amendment was substantive because it increased the punishment for the offense, and that retroactive application of the amendment to the defendant violated the Ex Post Facto Clause. 819 F.2d at 469-72. The Fourth Circuit stated: "We are bound by the result Congress dictated when it drafted the law in effect in 1981 – that fifteen-year-old offenders should be tried as juveniles, even if they are not charged until they reach the age of twenty." Id. at 472.

C. Fundamental Fairness Dictates That This Court Should Conduct An *In Camera* Comparison Of The Profile Reports To The Police Reports

This Court's refusal to either review the profile reports in comparison to the 1,806 pages of police reports *in camera* is inexplicable. It is the obligation of this Court to review *in camera* alleged exculpatory evidence so that it can be certain that Mr. Skakel, who is serving a sentence of twenty years to life, received a fair trial. Alternatively, this matter should be remanded for a full evidentiary hearing, which had been requested by the defense. Record, at 151.

Eight years prior to Mr. Skakel's arrest, the lead investigator prepared two "profile reports" – one for Kenneth Littleton and one for Thomas Skakel – that contained incriminating evidence pointing to each as the possible killer of Martha Moxley. Tr.5/13/02 at 76-7; 81. The State never disclosed the reports despite an order of the trial court to disclose any evidence that someone other than Mr. Skakel was involved in the commission of the murder. The existence of the profile reports came to the attention of Mr. Skakel's trial counsel mid-trial when the author of the reports, former State's Attorney Inspector John Solomon, testified. Skakel, 276 Conn. at 707-08. Trial counsel asked the court for a copy of the report, but the court denied the request by responding "not right now." Id., at 708. Trial counsel did not renew his request for the profile reports during the trial. *Id*. In his timely post-trial motion for new trial, trial counsel argued that Mr. Skakel's "constitutional and statutory rights were violated by the prosecution's belated disclosure of exculpatory informa-

tion and material....".[14] See Record, at 138. Following the jury's verdict and before sentencing, Mr. Skakel retained new counsel. Upon their review of the entire transcript, including Mr. Solomon's testimony regarding the profile reports, new counsel filed an amended motion for new trial and specifically raised the State's failure to disclose the profile reports. See Record, at 151.

This Court excuses the State's failure to comply both with a court order and with its *own* constitutional obligation to disclose exculpatory information by concluding trial counsel had failed to raise the issue in the original motion for new trial.[15] The original, timely motion for new trial was, in part, already based on a Brady violation. While the original mo-

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[14] Trial counsel specifically identified the late disclosure of the 1976 arrest warrant for Thomas Skakel and the 1992 videotaped police interviews of Littleton, but his motion for new trial was not limited to them.

[15] With respect to trial waiver, this Court's disparate treatment of the parties is manifestly unfair. In overruling Paradise and holding that the 1976 amendment to the statute of limitation should be applied retroactively to Mr. Skakel, this Court overlooked the State's explicit concession in its brief to the trial court that it could not rely on a claim for retroactive application of the 1976 amendment. Not only did the State fail to argue that Paradise should be overruled in the trial court proceedings, this Court also excused the State's failure to provide a full analysis of the issue in its appellate brief. Yet, this Court held Mr. Skakel to a higher standard than the State in its preservation of appellate issues. Even though defense counsel requested all exculpatory information in written pretrial motions, the court ordered the disclosure of all exculpatory information, the State has a constitutional obligation to provide all exculpatory information, defense counsel asked mid-trial for a copy of the profile reports as soon as he learned of their existence, and new counsel filed an amended motion for new trial raising the issue, this Court determined that Mr. Skakel "failed to raise it in a timely manner." Skakel, 276 Conn. at 710.

tion ***included*** Thomas Skakel's arrest warrant affidavit and the Littleton interviews, it was ***not*** limited to those items. The amended motion simply raised additional Brady claims based upon new counsel's review of the record. See Tr.8/28/02 at 25.[16] The specific Brady claims relating to the profile reports concerned the same two individuals, Thomas Skakel and Littleton, who were referred to in the original motion.[17] See Tr.8/28/02 at 26.

Additionally, because a Brady violation can be raised by way of a petition for new trial or a writ of habeas corpus, it would not serve the interests of justice to bar Mr. Skakel from making the claim before he was sentenced, particularly when there was no prejudice to the State. Moreover, our criminal rules do not require court permission to seek an extension to amend motions when the original motion is timely filed. Fundamental fairness mandates that this Court's decision affirming the trial court's refusal to invoke the interests

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16 Cf., Wagner v. Clark Equipment Co., 259 Conn. 114, 129-30 (2002) ("A change in, or an addition to, a ground of negligence or an act of negligence arising out of the single group of facts which was originally complained to have brought about the unlawful injury to the plaintiff does not change the cause of action. . . . It is proper to amplify or expand what has already been alleged in support of the cause of action, provided the identity of the cause of action remains substantially the same ....").

17 Furthermore, the State was on notice that it had a duty to provide exculpatory evidence whether it was pretrial, mid-trial or post-trial. If, in fact, the State's failure to provide the defense with a copy of the profile reports during pretrial discovery was an oversight, then certainly when Mr. Solomon was on the stand and testified about them, the State had an obligation to disclose the information at that time.

of justice provision of P.B. § 42-54 to permit the amendment should be reconsidered.[18]

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[18] This Court's claim that the defendant did not provide the court and the state with copies of 1806 pages of discovery until after the hearing on the defendant's amended motion for new trial improperly ignores certain facts. First, Mr. Skakel's new counsel specifically requested an evidentiary hearing in his amended motion for new trial and the accompanying memorandum of law. Record, at 151; Appendix to Defendant's Brief, A285. If an evidentiary hearing had been permitted, then Mr. Sherman would have testified about the documents received during discovery and the police reports would have been marked at that time. The Court denied the Defendant's request for an evidentiary hearing. Tr.8/28/02 at 89. Secondly, new counsel interrupted the court's recitation of its ruling to request that the profile reports be released to defense counsel so that a comparison could be made between the information in the profile reports and the police reports. Id., at 94. The court denied the request. Id., at 95. Thirdly, at the beginning of the next day, new counsel marked as an exhibit the 1,806 pages of police reports in order to provide an appellate court with the "raw data" to compare to the profile reports. Tr.8/29/02 at 2-3.

-and-

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APPENDIX H

S.C. 16844 STATE OF CONNECTICUT	:	SUPREME COURT
V.	:	STATE OF CONNECTICUT
MICHAEL C. SKAKEL	:	MARCH 1, 2006

STATE'S OPPOSITION TO THE DEFENDANT'S MOTION FOR REARGUMENT AND RECONSIDERATION OR REARGUMENT AND RECONSIDERATION EN BANC

Pursuant to P.B. §§ 60-1, 60-2, 70-7 and 71-5, the State of Connecticut opposes the defendant's Motion for Reargument and/or Reargument and Reconsideration *En Banc*. In his motion, the defendant requests reconsideration and reargument on three claims decided by this court in *State v. Skakel*, 276 Conn. 633, 888 A.2d 985 (2006). Specifically, he asks this court to revisit the statute of limitations issue, the transfer of prosecution to adult court, and the defendant's claims of entitlement to the state's summary reports.

Despite the defendant's protestations, this case presents no cause for reargument. The constitutional issues in which defendant attempts to wrap his statute of limitations and transfer claims are illusory. Further, defendant presents no authority for his contention that this court was obliged to review certain submissions *in camera*.

I. BRIEF HISTORY OF THE CASE

On January 19, 2000, the state charged the defendant with murder in violation of General Statutes § 53a-54 for the 1975 death of Martha Moxley. The defendant pled not guilty and elected a trial by jury.

Thereafter, the defendant was tried before a jury of twelve, the Honorable John F. Kavanewsky, Jr. presiding. On June 7, 2002, the jury found the defendant guilty. On August 29, 2002, the court sentenced the defendant to the custody of the Commissioner of Correction for not less than 20 years nor more than life. This appeal followed.

On January 24, 2006, the Court issued its opinion affirming defendant's conviction. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985 (2006).

II. SPECIFIC FACTS AND LEGAL GROUNDS RELIED UPON

A. The Application of a 1976 Amendment to the Statute of Limitations to a Murder Occurring less than Six Months Earlier Does Not Implicate, Much less Violate, Either Due Process Protections or Ex Post Facto Prohibitions[1]

In his motion for reargument, defendant raises the specter of two constitutional violations resulting from this Court's application of a 1976 amendment to the statute of limitations to a 1975 murder. First, he claims that this decision violates the ex post facto clause of Section 10 Article 1 of the United States Constitution. Def's Motion at 3-7. Second, he claims a due process violation under the Fourteenth Amendment to

---

1 The murder occurred October 30-31, 1975; the effective dated of PA76-35 amending the statute of limitations was April 6, 1976. *See* PA 76-35 (Appendix to State's Appellate Br. at A23).

the United States Constitution and Article I, Section 8 of the Connecticut Constitution. Def's Motion at 7-11. Both of these assertions are based on his claim of some sort of reliance interest in the now-discredited *Paradise* decision. *See State v. Paradise*, 189 Conn. 346 (1983); *see* Def's Motion at 4-11. Defendant seems to be arguing that the legislature's 1976 enactment should not apply to him because, from 1983 on, he relied on *Paradise* to shield him from prosecution.

There are at least three fundamental problems with the defendant's constitutional claims: 1) defendant never briefed these issues despite this Court's generous allowance of a 75 page brief; 2) neither the ex post facto nor due process clause has any application to the circumstances of this case; and 3) properly read, *Paradise* could not have created the reliance interest defendant claims, or if it did, it is not an interest society is prepared to recognize as worthy of protection.

Article I, § 10, cl. 1 of the United States constitution provides in pertinent part : "No State shall. . . pass any . . . ex post facto Law." This express language makes clear that the clause restricts the legislative branch of government: it does not reach rulings by the judiciary. *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001); *Marks v. United States*, 430 U.S. 188, 191 (1977). Therefore, however much defendant may disagree with this Court's decision to overrule *Paradise*, he has no basis on which to claim a retreat from precedent violates the ex post facto clause of Article I, Section 10.

Further, as to the application of an 1976 amendment to the statute of limitations to this 1975 murder, it is widely accepted that the application of a new limitation period to an offense for which the original period had not yet expired poses no ex post facto problems. *See Stogner v. California*, 539 U.S. 607, 618-19 (2003); *Commonwealth v. Duffy* 96 Pa. 506, 514 1880 WL 13543 (1881) ("[I]n any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject

to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws"). Therefore, it is plain that the 1976 legislature had the authority to eliminate any limitation period for this 1975 murder. This Court's decision in *Skakel* interpreting PA76- 35 §1 in this manner raises no concerns under the ex post facto clause.

Defendant attempts to overcome the fact that the ex post facto clause does not restrict judge-made law by asserting that although the clause does not generally apply to the judicial branch it should do so here because this Court was interpreting a statute rather than engaging in "mere common law" adjudication. Def's Br. at 6, n.3, n.4. In *Carmell v. Texas*, 529 U.S. 513 (2000) and *Lynce v. Mathis*, 519 U.S. 433 (1997), however, the two cases defendant cites for the significant expansion of constitutional doctrine he suggests, the courts determined that the statutes at issue – not judicial opinions overruling previous judicial interpretations – violated ex post facto principles. These cases, therefore, provide no support for defendant's claim that a decision to overrule precedent may violate the prohibition against ex post facto lawmaking.

The defendant's challenge under due process fares no better. Although the United States Supreme Court has recognized that "limitations on ex post facto decisionmaking are inherent in the notion of due process; *Bouie v. City of Columbia*, 378 U.S. 347, 349 n.1 (1967); the scope of those limitations are referenced to the "' basic [due process] principle that a criminal statute must give fair warning of the conduct that it makes a crime.'" *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001). In *Rogers*, the High Court dispelled any notion that the landmark *Bouie* decision intended to apply ex post facto limitations to the judiciary "jot for jot". *Id.* at 459. Instead, it clarified *Bouie* and it progeny as resting on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on

the constitutionality of *attaching criminal penalties to what previously had been innocent conduct.*" Id. (Emphasis added).

A fundamental aspect of the due process analysis in *Bouie*, and one that defendant attempts to obscure through his argument, is that the adequacy of notice is assessed at the time of the criminal conduct:

> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice *that his contemplated conduct* is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Bouie v. Columbia, 378 U.S. 347, 351 (1964) quoting *United States v. Harris*, 347 U.S. 612, 617 (1954) (emphasis added).

Properly understood, then, the due process clause offers the defendant no solace. Defendant cannot rely on this court's decision in *Paradise*, coming eight years after he committed this murder, as having somehow misled him as to the criminality of his conduct. The criminality of his conduct and its punishment were firmly set by statute at the time of the offense.

It is thus clear that this Court's decision overturning *Paradise* did not violate due process because it did not attach a criminal penalty to previously innocent conduct. *See People v. Mendoza*, 23 Cal. 4th 896, 925, 4 P.3d 265, 286 (2000)(Applying its decision overruling precedent to defendants "as is customary of judicial case law" because holding neither expands criminal liability nor enhances punishment for conduct previously committed. Further, at time they committed their crimes, defendants acquired no "cognizable reliance interest" on previous precedent); *Proctor and Lemell*

v. Texas, 967 S.W.2d 840 (Tex. Ct of Criminal Appeals 1998) (Decision overruling precedent which had required state to prove beyond a reasonable doubt that offense fell within the allowable period of prosecution did not deprive defendant of fair warning of what conduct will give rise to which criminal penalties); *Selsor v. Turnbull*, 947 P. 2d 579, 583 (Oklahoma Ct of Crim. App. 1997) (Judicial decision overturning precedent does not violate the Due Process clause or ex post facto principles, because it does not change the crime for which Petitioner is charged, increase the punishment prescribed therefore, or increase the quantity or degree of proof necessary to establish his guilt). Even if defendant hoped *Paradise* would shield him from prosecution, that hope is not the sort of expectancy interest society is prepared to honor. Just as this Court recognized that the legislature does not contract with criminals at the time of the passage of acts of limitation; *State v. Skakel*, 276 Conn. at 683; the *Paradise* court made no contract with the defendant assuring him that his crime would forever go unpunished.

Further, aside from the unreasonable nature of defendant's claimed expectancy interest, the defendant misreads both *Paradise* and *Skakel* by arguing that there is "no question"the defendant's prosecution was "*unlawful*" under the 1983 *Paradise* decision. Def's Motion at 1 (emphasis in original).This court expressly limited its holding in *Paradise* to the issue of retroactivity. *State v. Paradise*, 189 Conn. at 347 ("This consolidated appeal presents the sole issue of whether or not the current criminal statute of limitations, ... is to be applied retroactively."); *State v. Ellis*, 197 Conn. at 463 ("The only issue actually litigated and decided in *Paradise I* was whether the amended statute of limitations would receive retrospective application"). It never decided the issue of whether the 1975 version of the statute of limitations exempted murders. Moreover, in *Skakel* this court stated: "In light of our conclusion that P.A. 76-35 § 1, applies to the offense in the present case, we have no reason to address the

state's alternate contention that the legislature never intended to establish a limitation period for murder and, consequently, that the five year limitation period of the pre-1976 amendment version of 54-193, . . . does not bar the state's prosecution of the defendant for the murder of the victim. *State v. Skakel*, 276 Conn. at 667 n. 31. The only opinion directly addressing the issue – Justice Katz' concurrence – would have found no impediment to the defendant's prosecution under the 1975 version of the statute. *Id.* at 770 ("In my view, the crime of murder was not subject to the statute of limitations in effect in 1975, and, indeed, there never has been a limitations period on the prosecution of murder"). The foundation of defendant's expectancy argument – that he received immunity from prosecution in 1983 when this court decided *Paradise* – is therefore as insubstantial as the argument built upon it.

b. This Court Properly Upheld the Transfer of Prosecution to the Adult Division of Superior Court

The defendant raises three claims in support of his assertion that reargument is warranted on the juvenile transfer issue. First, he claims that this Court's reliance on a 1994 regulation promulgated by the Department of Children and Families (DCF) abrogated his "right" to juvenile status. Def's Motion at 11-14. Second, he claims that this court's reliance on this same regulation deprived him of due process of law because it made the transfer hearing an "unwinnable" exercise for him. Def's Motion at 15-16. Finally, he claims that application of the regulation to the transfer criteria violated the ex post facto clause of the United States Constitution because it "effected the severity of the punishment applied." Def's Motion at 18.

Once again, the premises underlying defendant's claim are faulty. At the time defendant committed this murder, he did not obtain a vested right to be forever regarded a juvenile.

Indeed, it is unclear whether "juvenile status" confers any substantial liberty interest, and if it does, whether that interest survives the age of majority. *See State v. Angel c*, 245 Conn. 93, 103 (1998) ("[W]e assume without deciding that a juvenile *in whom a liberty interest in his or her juvenile status has vested*, has a substantial liberty interest in the continuation of that juvenile status and that the juvenile cannot and should not be deprived of that status without the procedural protections claimed by the defendants.") (emphasis in original). In defendant's case, there is a substantial question whether any such liberty interest, if one exists at all, "vested" since the defendant was never prosecuted while a juvenile. *See Id.* After all, the special provisions for juvenile offenders are tied to, and in recognition of, the offender's youth. *See e.g.* General Statutes § 46b-121 (confidentiality); General Statutes § 46b-124 (sentencing limitations); General Statutes § 46b-140 (erasure of files); General Statutes § 46b-146 (isolation from adult criminal population). They are designed to give a young person an enhanced chance of rehabilitation on the presumption that his or her age makes that person more amenable to rehabilitation.[2] That presumption has no place in the prosecution of one who is already an adult. Had the defendant wanted to avail himself of the protections of the juvenile justice system he should have turned himself in while he was still a juvenile.

In any event, whatever interest defendant had or has in his juvenile status is governed solely by statute. *State v. Angel C.*, 245 Conn. at 104. Under the 1975 juvenile transfer

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[2] To the extent the special protections afforded juvenile offenders may also reflect society's view that youth mitigates culpability, that interest can be recognized at sentencing. Indeed, in this case, the court's sentence reflected consideration for defendant's age at the time of the offense. See T 8/29/02 at 85.

statute, the defendant could be tried and punished as an adult offender if certain findings were made. After an evidentiary hearing, the court ordered the prosecution transferred, finding the transfer criteria satisfied. Of particular import to defendant's claim, the court found that there was "no state institution designed for the care and treatment of children to which the court *may commit* such child which is suitable for his care and treatment." General Statutes § 17-60a (Rev. to 1975). Because this criteria looks to the treatment options available to the court, it must refer to the options available *at the time treatment decisions will be made*, not what may have been available had the defendant surrendered in 1975. Any other interpretation is nonsensical.

The institutions "designed for the care and treatment of children" to which the court may commit a juvenile convicted of murder, are those operating under the force of current DCF regulations. Those regulations precluded the court from committing the defendant to any DCF facility. Therefore, this Court's reliance on the 1994 DCF regulations was the only logical way to give effect to the 1975 statutory criteria. Whatever interest defendant may claim was fully protected at the juvenile transfer hearing.

c. There Is No Reason to Revisit this Court's Ruling on the State's Work Product Reports

Lastly, defendant characterizes this Court's rejection of his claim of entitlement to the state's summary reports as "inexplicable." Def's Motion at 18. He contends this Court was obligated to review his proffered discovery documents *in camera* to determine whether, as the state represented, the information contained in the summary reports came from the police reports and other items disclosed to the defendant. *See* Def's Mot. at 18.

Defendant offers no authority to support his contention that this Court was *obligated* to review these documents *in camera*. This Court's determination that defendant's demand

for those reports came too late is fully consistent with our rules of practice. See P. B. § 42-54. There is no reason to revisit this issue.

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully urges this Courts to deny defendant's Motion for Reconsideration, Reargument or Reconsideration and Reargument *en Banc*.

RESPECTFULLY SUBMITTED,

THE STATE OF CONNECTICUT

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No. 06-52

FILED

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In The

Supreme Court Of The United States

MICHAEL SKAKEL,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY THE WRIT OF CERTIORARI BECAUSE PETITIONER FAILED TO PRESENT HIS FEDERAL QUESTION TO THE STATE COURTS IN A TIMELY MANNER, AND, AS A CONSEQUENCE, THE CONNECTICUT SUPREME COURT NEVER ADDRESSED HIS DUE PROCESS CLAIM?

II. SHOULD THIS COURT DENY THE WRIT OF CERTIORARI BECAUSE THE PREMISE OF PETITIONER'S FEDERAL CLAIM REMAINS AN OPEN QUESTION UNDER CONNECTICUT LAW?

III. DOES A JUDICIAL DECISION OVERRULING A 1983 PRECEDENT AND APPLYING A 1976 STATUTE OF LIMITATION TO A 1975 MURDER VIOLATE PETITIONER'S RIGHT TO NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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STATEMENT OF THE CASE

Prior to 1973, all intentional murders committed in Connecticut were punishable by death. Since at least 1821, Connecticut's statute of limitations exempted "crimes punishable by death" from any time limit on prosecution.

In response to *Furman v. Georgia*, 408 U.S. 238 (1972), the Connecticut legislature re-wrote the state's murder and capital sentencing provisions in 1973. Under the new provisions, only some intentional murders were designated capital felonies subject to the death penalty.

Petitioner committed the crime of murder pursuant to Connecticut General Statutes § 53a-54a (Rev. to 1975) in October 1975. In April 1976, the Connecticut legislature eliminated any confusion, occasioned by its 1973 revision of Connecticut's death penalty, regarding the period of repose for murder by explicitly exempting the crimes of murder and capital felony from any limitation period. In 1983, in a case unrelated to the petitioner, (*State v. Paradise,* 189 Conn. 346, 456 A.2d 305 (1983)) the Connecticut Supreme Court held that the 1976 amendment to the statute of limitations should not be applied retroactively, but did not decide whether murder had been subject to a five year limitation period prior to the amendment.

Petitioner was arrested for this murder in January 2000. Relying on Connecticut's 1975 statute of limitations, General Statutes § 54-193 (Rev. to 1975), which imposed a five year time limit on the prosecution of serious offenses other than those "punishable by death", petitioner moved to dismiss the prosecution as time-barred. The trial court (*Kavanewsky, J.*) denied petitioner's motion to dismiss. A jury found petitioner guilty of murder in June 2002.

In light of the 1973 revision of Connecticut's murder and capital sentencing provisions, one question confronting the Connecticut Supreme Court on petitioner's appeal was whether all intentional murders remained exempt from any limitation period following the revision, or whether the legislature had silently altered the historic meaning of the limitation statute while amending a different provision of the General Statutes.

Connecticut's high court affirmed petitioner's conviction without resolving this issue, however. Instead, it overruled *State v. Paradise* and applied the 1976 amendment to Connecticut's statute of limitations to petitioner's 1975 crime.

In his Motion for Reargument and Reconsideration *en banc*, petitioner claimed for the first time that by overruling *Paradise* and applying the 1976 amendment to the statute of limitations to his offense, the Connecticut Supreme Court violated the Due Process Clause of the Fourteenth Amendment.

a) Facts Supporting the Conviction

As to the facts supporting the conviction, the respondent incorporates herein the facts contained in the decision below. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985 (2006) reproduced in Petitioner's Appendix (hereinafter P. App.) at a.[1]

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[1] The respondent relies not only the facts set forth at the outset of the opinion; P. App. at 3a-16a, but also as discussed in connection with various claims on appeal; P. App. 89a-91a (reviewing various incriminatory admissions made by petitioner while at Elan); P. App. 97a-98a, 101a (discussing petitioner's admission to his father, in 1980 or 1981, that he may have murdered victim); P. App. at 121a-126a (discussing state's argument that petitioner claimed to have masturbated in tree under which victim's

(continued...)

Suffice it to say, a careful review of the record reveals overwhelming evidence of petitioner's guilt. That evidence proved that on October 30, 1975, the petitioner, enraged by his brother Tommy's flirtation with their fifteen-year-old neighbor, Martha Moxley, with whom petitioner was also infatuated, followed her home, accosted her in her driveway and struck her numerous times in the head with a golf club. When the club broke, he stabbed her through the neck with the broken shaft.

At the crime scene the following day, police found the head and broken pieces of shaft from the golf club. Investigation revealed that the club belonged to the petitioner's deceased mother. The handle of the club, which would have contained a label identifying it as a "Skakel" golf club and possibly fingerprints, was never found.

In addition to strong evidence of motive, opportunity, and access to the murder weapon, thirteen separate witnesses testified to incriminatory admissions petitioner made in the years following the murder. Included in these were three outright confessions to three different, unrelated persons. None of petitioner's admissions or confessions was made to law enforcement.

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[1](...continued)
body was found in order to explain presence of semen should any be found as technology advanced); P. App. 126a-128a (discussing state's argument that evidence supported inference that petitioner's family orchestrated his alibi); P. App. at 129a-32a (discussing state's argument that petitioner's family placed him at Elan, a private residential school, from 1978-80 because they were aware he had committed this murder and wanted to remove him from purview of police); P. App. at 134a-137a (discussing state's evidence indicating petitioner masturbated on victim's body and how his admission to Coleman that he had done so was supported by condition of body and by his later claims to have masturbated in a tree).

A strong inference of guilt also arose from the ever-shifting nature of petitioner's alibi, which changed from his initial contention that 1) he left the area of the murder at about 9:30, returned about 11:00 pm, went to bed and never left the house again that night (1975); to 2) he was so drunk, he may have blacked out, cannot remember what happened, cannot remember if he killed the victim, the killer was either he or his brother (1978-80); to 3) he left the house after returning home at eleven to go get a kiss from the victim and masturbated in the tree under which her body was found. (1987-97). Petitioner's alibi was further undermined by testimony of a Skakel family friend that petitioner remained at the house during the time he claims to have left the area.

b) Petitioner's Motion to Dismiss and the Trial Court's Ruling Thereon

Pursuant to an arrest warrant dated January 14, 2000, petitioner was arrested and charged with the October 30-31, 1975 murder of Martha Moxley. Petitioner moved to dismiss. He argued that the statute of limitations in effect on the date of the offense, General Statutes §54-193 (Rev. to 1975), barred his prosecution because it was not commenced within five years of the homicide. *See* Respondent's App. at A1 (hereinafter R. App.).

After considering the state's objection and supporting memorandum, the trial court (*Kavanewsky, J*), denied the motion in a written Memorandum of Decision. R. App. at A1-A9. The trial court carefully considered to a trilogy of Connecticut cases: *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (1983), *State v. Ellis*,197 Conn. 436, 497 A.2d 974 (1985) and *State v. Golino*, 201 Conn. 435, 518 A.2d 57 (1986). The court relied on the teaching of *Ellis* and *Golino* that Connecticut's statute of limitations "'as a whole, represents a system, a classification scheme whereby the allowable period

of prosecution *is related to the gravity of the offense.*'" R. App. at A8, *quoting State v. Golino*, 201 Conn. at 444 (emphasis supplied in Memorandum). The court further relied on *Golino's* conclusion that the "'legislature used the phrase 'punishable by death' in [Connecticut's] limitations statute as a shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution.'" R. App. at A8; *quoting Golino,* 201 Conn. at 446. The court concluded that the gravity of the offense at issue, murder, has been "historically unquestioned." Accordingly, the trial court denied petitioner's motion to dismiss. R. App. at A9.

c) Proceedings Before the Connecticut Supreme Court

On appeal to the Connecticut Supreme Court, petitioner renewed his contention that his prosecution was time-barred under Connecticut General Statutes § 54-193 (Rev. to 1975) and *State v. Paradise*, 189 Conn. 346, 456 A.2d 305 (1983). Petitioner argued that *Paradise* was "both factually and legally indistinguishable" from his situation. P. App. at 31. In *Paradise*, the Connecticut Supreme Court had refused to apply an amendment to the statute of limitations, P.A. 76-35 § 1, which expressly exempted murder from any period of repose, retroactively. P. App. at 28a.

The state asked the court to overrule *Paradise*. P. App. at 31a. Alternatively, the state argued that *Paradise* rested on a faulty assumption, namely, that the five year limitation period of the pre-1976 version of § 54-193 applied to murder. P. App. at 31a-32a.

Connecticut's high court began its analysis by reviewing the pertinent statutes. The murder statute under which petitioner was convicted, Connecticut General Statutes § 53a-54a (Rev. to 1975), provides in part: "(a) A person is

guilty of murder when, with intent to cause the death of another, he causes the death of such other person or a third person . . . . (c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed, as provided by Section 53a-46a."

The Court noted that, at the time of this offense, Connecticut General Statutes §54-193 (Rev. to 1975) "prescribed a five year limitation period on prosecutions 'for treason . . . or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers . . .'" P. App. at 28a . As explained in *State v. Golino*, 201 Conn. at 438, "[t]he second clause of the statute provided a one year period of limitation on prosecutions 'for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment at Somers.'" *Id.* "Implicit in this statutory scheme is that 'crimes punishable by death' were outside any limitation period, and thus always amenable to prosecution." *Id.*

Prior to 1973, all intentional murders were punishable by death. Because, following the 1973 revision of Connecticut's murder statute, only those murders designated capital felonies were eligible for the death penalty, the question confronting the Connecticut Supreme Court in *Skakel* was whether all intentional murders remained exempt from any limitation period, or whether the legislature had silently changed the historic meaning of the limitation statute while amending a different provision of the General Statutes.

The Connecticut Supreme Court resolved petitioner's appeal without deciding this question, however. It did so in reliance on P.A. 76-35, § 1, a 1976 amendment to the statute of limitations which expressly exempts murder from any period of repose. The Connecticut court explained that in *Paradise*,

when it had been asked to apply P.A. 76-35, §1 to a murder committed before its effective date, it had declined to do so. The court noted the infirmity in its prior decision, and held:

> Upon reconsideration, we are persuaded that *Paradise* was wrongly decided. In particular, we conclude that we were misguided in establishing a presumption that, in the absence of a contrary indication of legislative intent, an amendment to a criminal statute of limitations is not to be applied retroactively. As we explain more fully hereinafter, we are convinced that, with respect to those offenses for which the preamendment limitation period has not expired, it is far more likely that the legislature intended for the amended limitation period to apply to those offenses. In view of the fact that the five year limitation period of the pre -1976 amendment version of § 54-193 had not expired with respect to the October 1975 murder of the victim when the 1976 amendment to that statutory provision became effective, we conclude that P.A. 76-35, §1, is the operative statute of limitations for purposes of this case. . . . Because, under P.A. 76-35, §1, there is no time period within which murder and other class A felonies must be prosecuted, the trial court properly denied the defendant's motion to dismiss the information.

P. App. at 32a-33a.

The court also noted that in light of its decision to overrule *Paradise* and apply P.A. 76-35, §1 retrospectively, it had no occasion to consider the state's alternate argument that murder in Connecticut had never been, and thus was not at the

time of this homicide, subject to a time limit for prosecution. P. App. at 32a, n. 31.

Following affirmance, petitioner filed a motion for reargument and reconsideration *en banc*. In this motion, he claimed for the first time that the retrospective application of P.A. 76-35, §1 violated the Due Process Clause of the United States Constitution. P. App. at 260a-287a. The state opposed the motion, and the Connecticut Supreme Court denied it without opinion. P. App. at 158a.

REASONS FOR DENYING THE WRIT

Petitioner claims that the Connecticut Supreme Court, by overruling a 1983 decision and permitting the retroactive application of a 1976 statute of limitation to a 1975 offense, violated his right to notice under the Due Process Clause of the Fourteenth Amendment. Underlying his due process claim is the assertion that the Connecticut court revived a time-barred prosecution.

Despite petitioner's protestations, the facts of this case do not implicate, much less violate, petitioner's due process rights. As an initial matter, before any consideration of petitioner's federal claim is possible, petitioner must overcome two obstacles to review. The first is his failure to raise his federal claim in a timely manner in the state courts and the resultant failure of the Connecticut Supreme Court to consider this issue. The second is the fact that the assumption underlying his claim – that his prosecution was at one point time-barred – rests on an unsettled question of state law.

Even if petitioner is able to overcome these impediments, however, the question presented herein is not worthy of this Court's consideration. Properly viewed, the decision of Connecticut's highest court is in accord with this

Court's ex post facto and due process precedent. Under *Stogner v. California*, 539 U.S. 607 (2003), for instance, the Connecticut court was free to apply its 1976 statute to a 1975 murder. This is so because, even if a 1975 murder carried a five year limitation on prosecution, as petitioner contends, that time had not expired when the amendment took effect. Further, petitioner cannot establish a due process violation under *Bouie v. City of Columbia*, 378 U.S. 347 (1964) and *Rogers v. Tennessee*, 532 U.S. 451 (2001), because, in overruling a 1983 decision, the Connecticut Supreme Court did not enlarge the offense of murder beyond what it was in 1975. Thus, because the Connecticut Supreme Court did not depart, to the detriment of the petitioner, from an interpretation of a penal statute that was settled at the time of his offense, petitioner's due process claim fails at an elementary level.

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER FAILED TO RAISE THE FEDERAL QUESTION IN A TIMELY MANNER AND, AS A CONSEQUENCE, THE CONNECTICUT SUPREME COURT NEVER DECIDED THE ISSUE

As petitioner appears to acknowledge, the first and only time he raised his due process claim in the Connecticut courts was in his motion for reconsideration and reargument *en banc*. See Pet. Cert. at 10; P. App. at 260a. Consequently, neither the trial court nor the Connecticut Supreme Court addressed the due process issue petitioner now presents. See R. App. at A1-A9 (Trial Court's Memorandum of Decision); P. App. at 1a-157a.

This court should deny certiorari due to petitioner's failure to raise his claim in a timely manner in the Connecticut courts. Under 28 U.S.C. § 1257 (a), this court has jurisdiction to review "final judgments or decrees from the highest court of

a State . . . where any . . . right . . . .is *specially set up or claimed* under the Constitution . . . . of the United States." (emphasis added).[2] This court has "almost unfailingly"; *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam); refused to consider a federal claim "unless it was either addressed by, or properly presented to, the state court that rendered the decision [this court is asked to review]." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). Where, as here, the state court is silent on the federal question at issue, this Court assumes that the issue was not properly presented. *Id.* at 86. The petitioner can overcome that presumption only by showing that the state court had a fair opportunity to address the federal question under consideration. *Id.* at 86-87.

Petitioner's failure to raise his federal due process claim at trial or on appeal deprived the Connecticut courts of an opportunity to address it. It is well settled that "[r]aising the federal question for the first time in a petition for rehearing . . . is generally insufficient unless the court actually entertains the petition and expressly decides the question . . . .To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory

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[2] § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

recitation that the petition has been fully or maturely considered and accordingly is denied . . . . There must be language indicating the federal question was considered and disposed of." Stern, R. L., Gressman, E., Shapiro, S.M., Geller, K.S., *Supreme Court Practice* (8th Ed. (2002) (hereinafter, Stern and Gressman) p. 181 (citations omitted).

No such language appears in the order of the Connecticut Supreme Court denying the request for reconsideration. The order states simply: "The Motion of the Defendant, filed February 14, 2006, for Reconsideration, to Reargue and for Reconsideration and Reargument en banc, having been presented to the court, it is hereby ordered denied." P. App. at 158a (emphasis omitted).

Thus, because petitioner failed to raise his due process claim in a timely manner, and because the Connecticut Supreme Court never passed on the claim in any meaningful way, this Court should deny the writ.

Undoubtedly, petitioner will argue that his assertion below was timely because his first opportunity to protest the effect of abandoning *Paradise* was after the court issued its decision. Although this Court has recognized a narrow exception to the timely presentation requirement where the "question is created by an *unexpected* decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question"; Stern and Gressman p. 183 (emphasis added); that is not the situation here. The demise of *Paradise* was not unexpected in light of the shaky foundations of the original decision, subsequent Connecticut cases which moved away from the rote retroactivity analysis that decision employed; see *In re Michael S.*, 258 Conn. 621, 627-29, 784 A.2d 317 (2001); *State v. Parra*, 251 Conn. 617, 628 n. 8, 741 A. 2d 902 (1999); *In re Daniel H.*, 237 Conn. 364, 372-3, 376, 678 A.2d 462 (1996); and additional decisions

casting doubt on the assumptions underlying *Paradise*. *State v. Ellis*, 197 Conn. 436, 497 A.2d 974 (1985); *State v. Golino*, 201 Conn. 435, 518 A.2d 57 (1986). Moreover, because the state's brief attacked *Paradise* on several fronts and expressly asked the court to overrule it, petitioner had an opportunity to anticipate and assert the federal question in his reply brief. See P. App. at 237a-259a.

Petitioner thus was on notice that *Paradise* was under siege and ripe for reconsideration. At least by his reply brief, petitioner could have raised the due process concerns he now expresses. Because petitioner failed to present his federal question to Connecticut's highest court in a timely manner, his petition should be denied.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE CORNERSTONE OF PETITIONER'S CLAIM – THAT *SKAKEL* REVIVED A TIME-BARRED PROSECUTION – INCORRECTLY ASSUMES THAT THE PROSECUTION WAS AT ONE POINT TIME-BARRED, WHEN IN FACT THAT REMAINS AN OPEN QUESTION UNDER CONNECTICUT LAW AND ONE ON WHICH PETITIONER WAS, AT ALL TIMES, UNLIKELY TO PREVAIL

The cornerstone of petitioner's argument – that the Connecticut Supreme Court revived a time-barred prosecution – incorrectly assumes that the prosecution was at one point time-barred. Petitioner asserts that murder carried a five year statute of limitation at the time of his offense. In fact, as is clear from both *Skakel* and *Paradise*, the issue of whether Connecticut ever had a five year limitation period for murder has been explicitly left open by Connecticut's highest court. Because this Court is without authority to decide an unsettled issue of state law, this is an inappropriate case for review by

certiorari.

The holding in *Paradise* is expressly limited to the issue of retroactivity. *State v. Paradise*, 189 Conn. at 347 ("This consolidated appeal presents the sole issue of whether or not the current criminal statute of limitations . . . is to be applied retroactively."); *State v. Ellis*, 197 Conn. at 463 ("The only issue actually litigated and decided in *Paradise I* was whether the amended statute of limitations would receive retrospective application"). *Paradise* thus never decided whether the 1975 version of the statute of limitations exempted murders.

In *Skakel,* moreover, the Connecticut court stated: "In light of our conclusion that P.A. 76-35, § 1, applies to the offense in the present case, we have no reason to address the state's alternate contention that the legislature never intended to establish a limitation period for murder and, consequently, that the five year limitation period of the pre-1976 amendment version of 54-193 . . . does not bar the state's prosecution of the [petitioner] for the murder of the victim." *State v. Skakel*, P. App. at 32a, n.31. The only opinion directly addressing the issue – the concurrence (*Katz, J.*) – would have found no impediment to petitioner's prosecution under the 1975 version of the statute. P. App. at 144a. ("In my view, the crime of murder was not subject to the statute of limitations in effect in 1975, and, indeed, there never has been a limitations period on the prosecution of murder").

The foundation of petitioner's due process claim -- that *Skakel* revived a time-barred prosecution – thus rests on an unsettled issue of Connecticut law. Further, as summarized briefly below, the better arguments prove the Connecticut legislature never intended to enact a time limit on the state's ability to prosecute murders, and, in fact, never did so.

In order to understand why there is any question

regarding the time limit for prosecuting a 1975 murder, some background is necessary. As the Connecticut Supreme Court explained in *Ellis*, the Connecticut statute of limitations dates back to 1821. *State v. Ellis*, 197 Conn. at 441. The language of the statute, with a few inconsequential exceptions, remained constant from the time of its enactment until its amendment in 1976. Throughout Connecticut's long history, the crime of murder, or at least intentional murder as proven here, had always been a crime punishable by death. Connecticut's high court interpreted the phrase "crimes punishable by death" found within the limitation statute, as a "shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution." *State v. Golino*, 201 Conn. at 446. Thus, in an unbroken line from at least 1821 to 1973, there was no question regarding the period of prosecution for murder.

What changed in 1973 was that the Connecticut legislature enacted Connecticut Public Act 73-137 (hereinafter P.A. 73-137). R. App. at A10-20. That Act repealed the former murder statute, Connecticut General Statutes §53a-54 (Rev. to 1972), retained the old statute's definition of murder as the intentional killing of another, and added a provision which designated certain murders capital felonies. *See* P.A. 73-137, §2(a); P.A. 73-137, §3. The Act also provided that "murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed by Section 53a-46a." P.A. 73-137, §2(c).

The genesis of P.A. 73-137 is *Furman v. Georgia*, 408 U.S. 238 (1972), which Connecticut interpreted as invalidating its capital sentencing statutes. *State v. Aillon*, 164 Conn. 661, 662, 259 A.2d 666 (1972). In the wake of *Furman*, the Connecticut legislature struggled to pass capital sentencing provisions that would comply with the constitution. Our murder statute was amended in 1973 with a view toward bringing our

capital procedures into compliance with constitutional mandates. H-136, 1973 H.P., Vol. 16, Part 6, p. 2925; *see State v. Ross*, 269 Conn. 213, 343 n. 77, 849 A.2d 648 (2004), *cert. denied sub. nom Ross ex rel Dunham v. Lantz*, 544 U.S. 1028 (2005).

As is clear from the legislative history of the 1973 act, the legislature designated some murders as capital felonies to comply with *Furman*; the lines so drawn do not reflect the legislature's diminished abhorrence for other intentional murders. Moreover, nothing in either the extensive legislative history or the text of the act suggests the legislature intended to impose a time limit on the prosecution of murder.

Connecticut law recognizes that "'[i]n the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language.'" *State v. Ellis*, 197 Conn. at 459. No language expressing a clear break with 150 years of Connecticut history appears in P.A. 73-137. Therefore, it is unreasonable to find, as petitioner contends, that when the legislature separately defined capital murders, it silently imposed a time limit on the prosecution of all other intentional murders.

As Justice Katz noted in her concurrence:

> It simply runs counter to reason to conclude that the legislature intended to impose, *for the first time in the state's history*, a statute of limitations on all murders [except those designated capital felonies]. . . without a discussion or any expression of opposition.

State v. Skakel, P. App. at 154a.

Importantly, when the Connecticut legislature actually

addressed the issue of the allowable period of prosecution for murder, it made clear that murder was, and should remain, exempt from any limitation period. In 1976, the legislature amended the statute of limitations to state expressly that there is no statute of limitations for class A felonies, a category which includes murder and other serious offenses, and capital felonies. *See* Connecticut General Statutes §54-193 (Rev. to 1977). As the Connecticut Supreme Court noted in *Ellis*, the legislative history of the 1976 Act makes clear that this provision was intended to "clarify" rather than to change existing law. *See State v. Ellis*, 197 Conn. at 459-60 *citing* 19 S. Proc.; Pt 1, 1976 Sess., p. 341 (Remarks of Senator David H. Neiditz). Under Connecticut law, "a clarifying act, which 'in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act.'" *State v. Blasko*, 202 Conn. 541, 557, 522 A.2d 753 (1987). Accordingly, in *Golino*, Connecticut's high court viewed the 1976 amendment as a "clear indication that the pre-1976 statute of limitations was not intended to bar a prosecution for murder[.]" *State v. Golino*, 201 Conn. at 445.

There are thus strong arguments to be made that, at the time of this offense, as had been true throughout Connecticut's history, no time limit existed on the prosecution of murder. At the very least, it remains an open and debatable question under Connecticut law. Because this Court has no authority to decide this issue in order to reach petitioner's due process claim, certiorari must be denied. *See e.g. Harman v. Forssenius*, 380 U.S. 528, 534 (1965) ("Where resolution of the federal constitutional question is dependent upon . . . the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication").

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE CONNECTICUT SUPREME COURT'S APPLICATION OF AN AMENDMENT TO THE STATUTE OF LIMITATIONS TO A CRIME FOR WHICH THE ORIGINAL PERIOD OF LIMITATION, IF ANY, HAD NOT EXPIRED IS IN FULL ACCORD WITH *STOGNER, ROGERS, BOUIE,* AND THE TREATMENT OF SIMILAR ISSUES THROUGHOUT THE COUNTRY

a) Because the Original Period of Limitation, If Any, Had Not Expired When the Connecticut Legislature Amended the Statute of Limitations, Applying That Amendment to this Offense Poses No Ex Post Facto Problem

In *Stogner v. California*, 539 U.S. 607 (2003), this Court held that the legislative revival of a previously time-barred prosecution violates the ex post facto clause of Article I, section 10 of the United States Constitution. *Stogner* reasoned that legislation which attempts to do so falls within the second category of ex post facto law described in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798), that is, a law that "aggravates a crime, or makes it greater than it was, when committed." *Stogner v. California*, 539 U.S. at 613 quoting *Calder*, supra,. at 390, 1 L. Ed. 648 (emphasis omitted). As this Court explained:

> After (but not before) the original statute of limitations had expired, a party such as Stogner was not 'liable to any punishment.' California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it

> was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability.

Stogner v. California, 539 U.S. at 613.

Central to this Court's reasoning in *Stogner*, therefore, was the fact that the petitioner's liability for the crime had been extinguished at the time the new law was enacted. As argued above, the question of whether the crime of murder carried *any* limitation period in 1975 is an open question under Connecticut law. Assuming, however, that petitioner is correct in asserting a five year statute of repose for a 1975 murder, that time had assuredly not expired when the legislature enacted P.A.76-35, expressly eliminating any such time period. Therefore, under the reasoning of *Stogner*, and consistent with the weight of authority throughout the country; *see State v. Skakel*, P. App. at 55a-56a, citing *People v. Sample*, 161 Cal. App.3d 1053, 1058, 208 Cal.Rptr. 318 (1984); *State v. O'Neill*, 118 Idaho 244, 248, 796 P.2d 121 (1990); *People v. Isaacs*, 37 Ill.2d, 205, 229, 226 N.E.2d 38 (1967); *State v. Schultzen*, 522 N.W.2d 833, 835 (Iowa 1994); *State v. Nunn*, 244 Kan. 207, 217, 768 P.2d 268 (1989); *Commonwealth v. Bargeron*, 402 Mass. 589, 593-94, 524 N.E.2d 829 (1988); *People v. Russo*, 439 Mich. 584, 594-97, 487 N.W.2d 698 (1992); *Christmas v. State*, 700 So.2d 262, 266-67 (Miss.1997); *State v. Hirsch*, 245 Neb. 31, 43-44, 511 N.W.2d 69 (1994); *State v. Hamel*, 138 N.H. 392, 395-96, 643 A.2d 953 (1994); *State v. Nagle*, 226 N.J.Super. 513, 516, 545 A.2d 182 (1988); *People ex rel. Reibman v. Warden of County Jail*, 242 A.D. 282, 284-85, 275 N.Y.S. 59 (1934); *People v. Pfitzmayer*, 72 Misc.2d 739, 741-42, 340 N.Y.S.2d 85 (1972); *State v. Buchholz*, 678 N.W.2d 144, 149 (N.D.2004); *State v. Dufort*, 111 Or.App. 515, 519, 827 P.2d 192 (1992); *Commonwealth v. Johnson*, 520 Pa. 165, 170, 553 A.2d 897

(1989); *State v. Wolfe*, 61 S.D. 195, 199, 247 N.W. 407 (1933); *Rose v. State*, 716 S.W.2d 162, 165 (Tex. App.1986, pet.ref'd), cert. denied, 486 U.S. 1055 (1988); *State v. Lusk*, 37 P.3d 1103, 1109-10 (Utah 2001); *State v. Petrucelli*, 156 Vt. 382, 383-84, 592 A.2d 365 (1991); *State v. Hodgson*, 108 Wash.2d 662, 665-68, 740 P.2d 848 (1987); the Connecticut Supreme Court's application of a 1976 amendment to a 1975 murder poses no ex post facto problems.

b) Because Statutes of Limitation Do Not Define or Regulate Criminal Conduct, They Do Not Come under *Bouie*'s Due Process Rubric

In *Bouie v. City of Columbia*, 378 U.S. 347 (1967), this Court held that a state court decision upholding petitioner's conviction by construing a criminal trespass statute to include the act of remaining on another's property after being asked to leave, when the statute had previously been limited to the unlawful entry onto the property of another, violated due process. *Bouie* determined that neither the plain language of the statute, nor prior judicial constructions, gave petitioners fair warning at the time of their conduct, that the act for which they were convicted was included in the statute. *Id.* at 355.

Bouie thus established that "limitations on ex post facto decisionmaking are inherent in the notion of due process"; *Bouie v. City of Columbia*, 378 U.S. 347, 349 n.1. Subsequent cases have made clear, however, that the scope of those limitations are referenced to the "'basic [due process] principle that a criminal statute must give fair warning of the conduct that it makes a crime.'" *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001).

In *Rogers*, this Court dispelled any notion that *Bouie* intended to apply ex post facto limitations to the judiciary "jot for jot." *Id.* at 459. Instead, it clarified *Bouie* and it progeny as

resting on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of *attaching criminal penalties to what previously had been innocent conduct.*" Id. (Emphasis added).

A fundamental aspect of the due process analysis in *Bouie*, therefore, and one that petitioner attempts to obscure through his argument, is that the notice to which an accused is entitled concerns the criminality of his contemplated conduct under the statute defining the crime:

> 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Bouie v. Columbia, 378 U.S. 347, 351 (1964) quoting *United States v. Harris*, 347 U.S. 612, 617 (1954).

The due process restraints imposed on the judiciary, therefore, are more limited than those imposed on the legislature under the ex post facto clause. Due process is concerned solely with the judicial application of "novel construction[s] of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope[.]" *United States v. Lanier*, 520 U.S. 259, 266-67 (1997) *see Marks v. United States*, 430 U.S. 188, 191-92 (1977) (due process prohibits retroactive application of judicially created obscenity standards to conduct that would have gone unpunished under previous standards); *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam); (conviction

under an impermissibly vague statute violated due process where accused did not have fair warning that criminal liability under obscenity statute is dependent on place where film is shown); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (unforeseeable judicial enlargement of a criminal statute could not be applied retroactively to make an act, innocent when done, criminal); *Douglas v. Bader*, 412 U.S. 430, 432-33 (1973) (*per curiam*) (unforeseeable interpretation of traffic violation as an arrest and hence a basis for revoking petitioner's probation deprived petitioner of due process).

Skakel did not expand petitioner's criminal liability by adopting a novel construction of a criminal statute. The elements of murder were clear at the time of the offense and were unaffected by the *Skakel* decision. Unlike the situations in which this Court has found a due process violation, then, the Connecticut court's reinterpretation of the 1976 statute of limitations did not expand the offense of murder beyond what it had been at the time of the offense. As the Connecticut Supreme Court noted, statutes of limitation do not "purport to define or regulate criminal conduct in any way." P. App. at 58a. Rather, they represent expressions of legislative grace which inure to the benefit of criminal defendants. P. App. at 50a. Because *Bouie* and its progeny are limited to the interpretation of criminal statutes and seek to ensure that "a person of ordinary intelligence has fair notice that his contemplated conduct is forbidden;" *Bouie v. Columbia*, 378 U.S. at 351; a decision applying a statute of limitation retroactively simply does not fit within *Bouie*'s due process framework.[3]

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[3] State courts that have considered the due process implications of judicial reversals seem to share a similarly narrow view of *Bouie*. *See e.g. People v. Mendoza*, 23 Cal. 4th 896, 925, 4 P.3d 265, 286 (2000) (applying its decision overruling precedent to petitioners "as is customary of judicial cases law" because holding

(continued...)

c) Even If the Extension of a Statute of Limitation Is Considered an Expansion of Criminal Liability, Notice must Be Assessed at the Time of the Criminal Conduct; Petitioner's Reliance on *Paradise*, Decided Eight Years after This Murder, Is Therefore Misplaced

As stated previously, the elements of murder and the scope of petitioner's liability for that offense were unaffected by *Skakel*. Even if one assumes, however, that the period of prosecution for an offense is an essential aspect of liability to which a person is entitled to notice, petitioner cannot claim the state of the law in 1975 led him to believe there was a five year limit. At the time of this murder, Connecticut's long history of exempting murder from any limitation period, and the general understanding of the phrase "crimes punishable by death" as referring to a category of offenses that had always included murder, would have led a reasonable person to conclude that no repose was possible. See Section II, *supra*. Rather than rely on settled law at the time of this offense, therefore, petitioner

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[3](...continued)
neither expands criminal liability nor enhances punishment for conduct previously committed; further, at time they committed their crimes, petitioners acquired no "cognizable reliance interest" on previous precedent); *Proctor and Lemell v. Texas*, 967 S.W.2d 840 (Tex. Ct of Criminal Appeals 1998) (decision overruling precedent which had required state to prove beyond a reasonable doubt that offense fell within the allowable period of prosecution did not deprive petitioner of fair warning of what conduct will give rise to which criminal penalties); *Selsor v. Turnbull*, 947 P. 2d 579, 583 (Oklahoma Ct of Crim. App. 1997) (judicial decision overturning precedent does not violate due process clause or ex post facto principles, because it does not change crime with which petitioner is charged, increase punishment prescribed therefore, or increase quantity or degree of proof necessary to establish guilt).

stakes his claim on *Paradise*, a judicial decision coming eight years after his crime. Unfortunately for petitioner, any misapprehension he may have acquired in 1983 is without constitutional significance.

d) Petitioner Posits a False Conflict

The above discussion serves to explain why the decisions petitioner contends are in conflict with *Skakel* are not truly at odds. In fact, all three of the cases petitioner cites in support of a supposed "conflict" involve a straightforward application of *Bouie* which, as demonstrated above, this case does not.

In *Moore v. Wyrick*, 766 F.2d 1253, 1258-59 (8th Cir. 1985), *cert denied sub. nom Armontrout v. Moore*, 475 U.S. 1032 (1986), for instance, the Eighth Circuit held that Missouri's conviction of the petitioner under a theory of felony murder that was excluded by a prior decision violated the petitioner's right to notice under due process. As the Eighth Circuit explained, a 1922 Missouri decision had limited Missouri's felony murder statute to situations in which a petitioner or accomplice commits the killing. *Id.* at 1254. In the petitioner's direct appeal, however, the Missouri Supreme Court overruled the earlier decision and upheld Moore's conviction for a killing by an uninvolved bystander. *Id.*; see *State v. Moore*, 580 S. W. 2d 747 (Mo. 1979) (en banc). Not surprisingly, the Eighth Circuit held that "[b]ecause the Missouri Supreme Court's decision . . . effected a change in the law, which if applied retroactively would materially expand Moore's criminal liability, this change cannot, consistent with *Bouie* . . . be applied retroactively if this change in the law was constitutionally unforeseeable." *Moore v. Wyrick*, 766 F.2d at 1257. Finding it was unforeseeable under Missouri law, the court reversed.

Moore therefore presents a much different issue than *Skakel*. In *Moore*, the challenged decision expanded the petitioner's criminal liability beyond what it was at the time he committed the offense. *Skakel*, as argued above, did not expand the elements of murder beyond what they were in 1975.

The two other cases on which petitioner relies, *United States v. Potts*, 528 F.2d 883 (9th Cir. 1975) and *People v. Martinez*, 20 Cal. 4th 225, 973 P. 2d 512, 83 Cal. Rpt. 2d 533 (1999) are similarly inapposite. In both, the state of the law at the time of the offense would not have given a person of ordinary intelligence fair warning that his or her contemplated conduct was criminal. In *Potts*, the Ninth Circuit overruled its prior decision that held that a person whose prior conviction had been expunged under state law was no longer a prior felon for purposes of a federal statute making it a crime for a felon to possess explosives. Although it determined that the prior case was wrongly decided, the court noted that while the prior decision stood "a person such as Potts, whose sole prior felony conviction had been expunged pursuant to Washington statute, could not reasonably have suspected that his possession of a firearm . . .would constitute a [violation of federal law]. As Potts lacked notice of our subsequently revised view of the statute, 'due process fairness bars the retroactive judgment of his conduct using the expanded definition.'" *Unites States v. Potts*, 528 F.2d at 886.

Likewise in *Martinez*, California's high court recognized that it could not apply its newly expanded definition of asportation for the crime of kidnaping to the defendant, reasoning:

> 'Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in

> language that the common world will understand, of what the law intends to do if a certain line is passed'. . . . At the time of defendant's crime, the line for simple kidnapping (sic) asportation was laid down in [our prior decisions]. Defendant's conduct did not cross it, and he had no fair warning it would be redrawn.

People v. Martinez, 20 Cal. 4th at 240- 41, 973 P. 2d at 522-23, 83 Cal. Rptr. at 543-44.

All three decisions, therefore, involved the extension of criminal liability to conduct that was not criminal at the time of the offense. Petitioner's claim, by contrast, does not rely on an expansion of criminal liability and does not take the time of the offense as its touchstone. For these reasons, petitioner fails to establish a claim under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Writ of Certiorari.

Respectfully submitted,

THE STATE OF CONNECTICUT

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No. 06-52

In The

Supreme Court Of The United States

MICHAEL SKAKEL,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

APPENDIX

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Public Act No. 73-137 ..... A-10

FST - CR00 - 135792 - T

STATE OF CONNECTICUT : SUPERIOR COURT

VS. : JUDICIAL DISTRICT OF STAMFORD-NORWALK

MICHAEL SKAKEL : DECEMBER 11, 2001

MEMORANDUM OF DECISION RE:
MOTION TO DISMISS

Before the court is the defendant's motion to dismiss pursuant to Practice Book § 41-8 (3),[1] dated June 20, 2000. The motion was originally filed in the Juvenile Division of the Superior Court. The court there declined to rule on the motion.[2] The case was transferred to the Criminal Division of the Superior Court, and the motion has been heard and submitted for decision to this court.

The information charges the defendant with the murder of Martha Moxley in the town of Greenwich on or about October 30-31, 1975, in violation of General Statutes § 53a-54a. The defendant claims in his motion that the statute of limitations in effect at the time of the offense, General Statutes (Rev. to 1975) § 54-193, bars his prosecution after five years from the date of the offense. It is undisputed that the

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[1] Practice Book § 41-8 provides in relevant part: "The following defenses or objections, if capable of determination without a trial of the general issue, shall, if made prior to trial, be raised by a motion to dismiss the information: . . . (3) Statute of limitations . . ."

[2] When addressing this motion, the Juvenile Division of the Superior Court found that the motion was "premature." In re Michael S., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. 01028 (January 21, 2001, *Dennis, J.*).

prosecution of the defendant commenced after this period.[3]

General Statutes (Rev. to 1975) § 54-193, the statute of limitations in effect at the time of this offense, provided in pertinent part as follows:

> "Sec. 54-193. LIMITATION OF PROSECUTIONS FOR VARIOUS OFFENSES. No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed . . ."

The parties do not disagree that this is the statute of limitations that applies to the instant case. However, they differ over its *meaning as applied* here. More particularly, the parties dispute the correct interpretation of a series of Connecticut Supreme Court decisions that bear on the issue of whether the prosecution of this defendant is time-barred. These decisions are State v. Paradise, 189 Conn. 346, 456 A.2d 305 (1983), State v. Ellis, 197 Conn. 436, 497 A.2d 974 (1985), on appeal after remand sub nom. State v. Paradise, 213 Conn. 388, 567 A.2d 1221 (1990), and State v. Golino, 201 Conn. 435, 518 A.2d 57 (1986).

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[3] The defendant was charged with this crime in an arrest warrant dated January 14, 2000, and he was arrested on January 19, 2000.

In the consolidated appeals in Paradise, the two defendants, Paradise and Ellis, were arrested in 1981 and charged in informations with murder, in violation of General Statutes (Rev. to 1975) § 53a-54a,[4] and other class A felonies in connection with the homicide of one Cunningham in 1974. State v. Paradise, supra, 189 Conn. 347. The defendants moved to dismiss the informations on the ground that their prosecution was barred by the expiration of the five year limitation period in General Statutes (Rev. to 1975) § 54-193, which was the statute of limitations in effect at the time of the offense in 1974. Id., 347-48. The trial court agreed with the defendants, dismissed the informations, and the state appealed. Id., 348. On appeal, the state argued that Public Acts 1976, No. 76-35,[5] which became effective on April 6, 1976, amended

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[4] General Statutes (Rev. to 1975) § 53a-54a provided in relevant part: "MURDER DEFINED. . . . (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception . . . ."

[5] Public Acts 1976, No. 76-35 provided: "AN ACT CONCERNING THE LIMITATION OF PROSECUTIONS.

Section 1. Section 54-193 of the general statutes is repealed and the following is substituted in lieu thereof: No person shall be prosecuted for [treason against this state, or for] any [crime or misdemeanor of] OFFENSE EXCEPT A CAPITAL FELONY OR A CLASS A FELONY FOR which the punishment is or may be imprisonment [in the Connecticut Correctional Institution, Somers] IN EXCESS OF ONE YEAR, except within five years next after the offense has been committed; nor shall any person be prosecuted for [the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers] ANY OTHER OFFENSE, EXCEPT A CAPITAL FELONY OR A CLASS A FELONY, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section,

the then existing General Statutes (Rev. to 1975) § 54-193 to provide that there shall be no limitation of time within which a person may be prosecuted for a capital or class A felony, and that it should be applied retroactively. Id., 350.

The Supreme Court, in finding that there had been no error in the dismissal of the informations, held that General Statutes § 54-193, as amended by Public Acts 1976, No. 76-35, could not be given retrospective effect inasmuch as there was nothing in the statute evincing a "clear legislative intent" to do so. Id., 353.[6] It is this holding upon which the defendant in the present case primarily relies. He claims, like the defendants in State v. Paradise, that the five year statute of limitations set forth in General Statutes (Rev. to 1975) § 54-193 applies to this crime, which was committed in 1975, and prevents his prosecution.

In determining whether there is a limitation of prosecution in the present case, consideration must also be given to the Supreme Court's decisions in State v. Ellis, supra, 197 Conn. 436, and State v. Golino, supra, 201 Conn. 435. In Ellis, the Court entertained the consolidated appeals of three defendants, two of whom were the same defendants in Paradise. Subsequent to the State v. Paradise decision in 1983,

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it shall be brought within such time. THERE SHALL BE NO LIMITATION OF TIME WITHIN WHICH A PERSON MAY BE PROSECUTED FOR A CAPITAL FELONY OR A CLASS A FELONY.

Sec. 2. This act shall take effect from its passage. Approved April 6, 1976"

[6] The trial court granted the defendants' motions to dismiss on the basis that § 54-193 as amended "effected a change of substantive law and because it did not expressly provide for retroactive effect was not to be so applied." Paradise, supra, 189 Conn. 350. The Supreme Court affirmed the result of the trial court using a statutory construction analysis and "render[ed] unnecessary a determination of whether § 54-193 is substantive or procedural . . . ." Id., 353.

the Paradise defendants were rearrested on charges of capital felony, in violation of General Statutes § 53a-54b (5).[7] State v. Ellis, supra, 197 Conn. 439. The third defendant, Worthington, who was not originally arrested with the Paradise defendants in 1981, was also arrested on charges of capital felony. Id. Worthington moved to dismiss the capital felony indictment, arguing that General Statutes (Rev. to 1975) § 54-193 barred prosecution for capital felony unless the prosecution commenced within five years from the date of the offense.[8] Id., 440.

The Ellis Court determined that, to accurately examine General Statutes (Rev. to 1975) § 54-193, whose original predecessor had been enacted in 1821, the court must not interpret the statute in a vacuum, but "must ascertain the statute's meaning by considering its history, its language, the purpose it is designed to serve and the circumstances surrounding its enactment." (Internal quotation marks omitted.) Id., 445. Accordingly, the Court conducted an historical overview of the statute of limitations. It noted that "[t]hen, as now, crimes were classified according to their punishments. While the punishment of crime and the criminal law itself have changed significantly . . . the language and structure of our limitations statute remains substantially the

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[7] General Statutes (Rev. to 1983) § 53a-64b provided in relevant part: "CAPITAL FELONY DEFINED. A person is guilty of a capital felony who is convicted of any of the following . . . (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety. . ."

[8] Paradise and Ellis also moved to dismiss arguing that the doctrine of res judicata barred their second prosecution. The trial court agreed and dismissed the informations against them. The Supreme Court, however, found that the trial court had improperly applied the doctrine and set aside the judgments of dismissal. Ellis, supra, 197 Conn. 478. Paradise also joined Worthington in his claim as an alternate ground for sustaining the dismissal of the information against Paradise. Id., 440.

same." Id., 442. In examining the 1821 statute of limitations, the Court concluded that "the statute, as a whole, represents a system, a classification scheme whereby the allowable period of prosecution is related to the *gravity of the offense*." (Emphasis added.) Id., 450.

The Court also addressed legislative amendments over the years, in particular one in 1846 dividing the crime of murder into first degree and second degree for purposes of the statute of limitations and another in 1951 abrogating the mandatory death penalty for murder in the first degree. Id., 456. Although the Court noted that the death penalty would be unconstitutional following a decision by the United States Supreme Court; Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346, reh. denied, 409 U.S. 902, 93 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); it did "not believe that the legislature, in abrogating the mandatory death penalty, intended to reclassify murder in the first degree as a crime not punishable by death." Id., 456-57. The Court borrowed the reasoning and analysis in State v. Zarinsky, 75 N.J. 101, 110, 380 A.2d 685 (1977), when that court "chose to examine individually each legislative enactment affected by the concept of crimes punishable with death in view of the broader policy goals implicated in the legislative design." (Internal quotation marks omitted.) State v. Ellis, supra, 197 Conn. 457. The Court found that "[t]he concerns addressed by the 1951 legislature with regard to capital punishment bear no substantive relationship to the competing interests underlying the statute of limitations. Since 1672, our legislatures have resolved these interests by refusing to grant repose to those accused of capital crimes. It is unlikely that the 1951 legislature intended to alter this deep-rooted understanding." Id., 457-59.

The Court further addressed the 1976 amendment to General Statutes § 54-193 which removed any time limitation on the prosecution of a capital felony or class A felony. The

Court noted that the sponsor of the 1976 amendment, Senator David H. Neiditz, stated that its purpose was to clarify the existing law. Id., 460. In considering the 1976 amendment and the remarks of its sponsor, the Court determined that the legislature never intended to place time limitations on capital prosecutions. Id. Accordingly, the Ellis Court held that General Statutes (Rev. to 1975). to 1975) § 54-193 permitted the prosecution of a defendant, charged with capital felony in violation of General Statutes (Rev. to 1975). to 1975) § 53a-54b (5), who was first arrested in 1983 for a homicide committed in 1974.

The final piece to the statute of limitations trilogy is State v. Golino, supra, 201 Conn. 435 (1986). In Golino, the defendant had been arrested in 1984 and charged with murder, in violation of General Statutes (Rev. to 1972) § 53a-54(a)(1),[9] for a homicide committed in 1973. The Golino Court held that "because § 53a-54 (c) prescribes a possible death sentence, a violation of § 53a-54(a)(1) is an offense 'punishable by death' for purposes of the statute of limitations, and accordingly, prosecution of the defendant in 1984 for the 1973 slaying is not time-barred." Id., 438-39. The defendant maintained that because he could not constitutionally have been sentenced to death, in light of the United States Supreme Court's decision in Furman and our Supreme Court's decision in State v. Aillon, 164 Conn. 661, 295 A.2d 676 (1972), the court should apply the five year statute of limitations for crimes punishable by imprisonment at Somers. Id., 439. The Court stated that if the challenged statutory provision, "crime punishable by death," is "inextricably tied to the imposition of the death penalty, upon abolition of the death penalty, that procedural provision would

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[9] General Statutes (Rev. to 1972) § 53a-54 provided in relevant part: "MURDER DEFINED. . . . (a) A person is guilty of murder when: (1) With intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception . . . ."

fall; on the other hand, if the history and purpose underlying the provision evidences a broader policy goal, that provision should be interpreted to effectuate such a goal." (Internal quotation marks omitted.) Id., 440-41.

In finding that the history and purpose underlying the statutory provision evidences a broader policy goal, the Court, in quoting its previous decision in Ellis stated that "[a]lthough we acknowledge the fundamental principle that criminal statutes are to be strictly construed, it is equally fundamental that the rule of strict construction does not require an interpretation which frustrates an evident legislative intent." (Internal quotation marks omitted.) Id., 441. Relying on the rationale and analysis in Ellis, the Golino Court reaffirmed the conclusion that our statute of limitations "as a whole, represents a system, a classification scheme whereby the allowable period of prosecution *is related to the gravity of the offense*." (Emphasis in original.) Id., 444.

The Court, as it did in Ellis, looked again to legislative intent and viewed remarks of the sponsor of the 1976 amendment to determine that the "pre-1976 statute of limitations was not intended to bar a prosecution for murder, the crime with which the defendant is charged, even though in 1973 the defendant could not have been sentenced to death." Id., 445. The Court addressed the matter of the unconstitutionality of the death penalty and concluded that "[t]he fact that particular procedures for implementing the death penalty were held unconstitutional in Furman . . . and State v. Aillon . . . does not diminish the serious nature of an offense which, prior to those decisions, was punishable by death. We conclude that the legislature used the phrase 'punishable by death' as a shorthand reference to a category of crimes which, because of their atrocious nature, would always be amenable to prosecution." Id., 446.

Finally, Golino appears to certify the limited nature of

what was under consideration by the Court in Paradise, upon which the present defendant heavily depends. In Paradise, the Court simply held that Public Acts 1976, No. 76-35,[10] amending General Statutes (Rev. to 1975) § 54-193 was not, by its terms, retroactive. See, Golino, supra, 201 Conn. 440 n.5. ("In State v. Paradise, 189 Conn. 346, 456 A.2d 305 (1983), we addressed the narrow issue of whether this amendment could be applied retroactively. We ruled it could not, because the amendment, by its terms, did not provide for its retroactive application. Id., 353.).

In conclusion, the correct analysis of the issue presented gives great regard to the gravity of the offense charged, not solely its punishment. Connecticut precedents show that the gravity of the offense charged here, the crime of murder, has been historically unquestioned. This court, in examining the decisions and statutes together and as a whole, is not persuaded that the statute of limitations in effect at the time of the offenses charged in 1975, General Statutes (Rev. to 1975) § 54-193, bars the prosecution of the defendant. Therefore, the motion to dismiss is denied.

So ordered.

/s/
KAVANEWSKY, J.

[10] See footnote 5.

Substitute House Bill No. 8297

PUBLIC ACT NO. 73-137

AN ACT CONCERNING THE DEATH PENALTY.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Section 53a-45 of the 1969 supplement to the general statutes is repealed and the following is substituted in lieu thereof: (a) Murder is punishable as a class A felony unless IT IS A CAPITAL FELONY AND the death sentence is imposed as provided by section [53a-46] 4 OF THIS ACT .

(b) [Where the court and the state's attorney consent, a person indicted for murder may plead guilty thereto, in which case the court shall sentence him as for a class A felony.

(c)] If a person indicted for murder waives his right to a jury trial and elects to be tried by a court, the court shall be composed of the judge presiding at the session and two other judges to be designated by the chief justice of the supreme court, and such judges, or a majority of them, shall determine the question of guilt or innocence and shall, as provided in said section [53a-46] 4 OF THIS ACT, render judgment and impose sentence.

[(d)] (c) The court or jury before which any person indicted for murder is tried may find him guilty of homicide in a lesser degree than that charged.

Sec. 2. (NEW) (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by

force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

(c) Murder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided by section 4 of this act.

Sec. 3. (NEW) A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the state police department or of any local police department, a county detective, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 of the 1969 supplement to the general statutes, an official of the department of correction authorized by the commissioner of correction to make arrests in a correctional institution or facility, or of any fireman, as defined in subsection (10) of section 53a-3 of the 1971 noncumulative supplement to the general statutes, while such victim was acting within the scope of his duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been

convicted of intentional murder or murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided such seller was not, at the time of such sale, a drug-dependent person.

Sec. 4. (NEW) (a) A person shall be subjected to the penalty of death for a capital felony only if a hearing is held in accordance with the provisions of this section.

(b) When a defendant is convicted of or pleads guilty to a capital felony, the judge or judges who presided at the trial or before whom the guilty plea was entered shall conduct a separate hearing to determine the existence or nonexistence of any of the factors set forth in subsections (f) and (g) of this section for the purpose of determining the sentence to be imposed. Such hearing shall not be held if the state stipulates that none of the aggravating factors set forth in subsection (g) of this section exists or that one or more of the mitigating factors set forth in subsection (f) of this section exists. Such hearing shall be conducted (1) before the jury which determined the defendant's guilt or (2) before a jury impanelled for the purpose of such hearing if (A) the defendant was convicted upon a plea of guilty; (B) the defendant was convicted after a trial before three judges as provided in subsection (b) of section 1 of this act; or (C) if the jury which determined the defendant's guilt has been discharged by the court for good cause or (3) before the court, on motion of the defendant and with the approval of the court and the consent of the state.

(c) In such hearing the court shall disclose to the

defendant or his counsel all material contained in any presentence report which may have been prepared. No presentence information withheld from the defendant shall be considered in determining the existence or nonexistence of any of the factors set forth in subsection (f) or (g). Any information relevant to any of the mitigating factors set forth in subsection (f) may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors set forth in subsection (g) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in either of subsections (f) and (g). The burden of establishing any of the factors set forth in subsection (g) shall be on the state. The burden of establishing any of the factors set forth in subsection (f) shall be on the defendant.

(d) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence of each of the factors set forth in subsection (f) and subsection (g).

(e) If the jury or, if there is no jury, the court finds that one or more of the factors set forth in subsection (g) exists and that none of the factors set forth in subsection (f) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the factors set forth in subsection (g) exists or that one or more of the factors set forth in subsection (f) exist, the court shall impose the sentence for a class A felony.

(f) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (d), that at the

time of the offense (1) he was under the age of eighteen or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or (3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or (4) he was criminally liable under sections 53a-8 and 53a-10 of the 1971 noncumulative supplement to the general statutes and section 53a-9 of the 1969 supplement to the general statutes for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (5) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person.

(g) If no factor set forth in subsection (f) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that (1) the defendant committed the offense during the commission or attempted commission of or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment,

of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

Sec. 5. Section 53a 92 of the 1969 supplement to the general statutes is repealed and the following is substituted in lieu thereof: (a) A person is guilty of kidnapping in the first degree when he abducts another person and when: (1) His intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct or to refrain from engaging in particular conduct; or (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually; or (B) accomplish or advance the commission of a felony; or (C) terrorize him or a third person; or (D) interfere with the performance of a government function [or (3) the person abducted dies during the abduction or before he is able to return or to be returned to safety. Such death shall be presumed, in a case where such person was less than sixteen years old or an incompetent person at the time of the abduction, from evidence that his parents, guardians or other lawful custodians did not see or hear form him following the termination of the abduction and prior to trial and received no reliable information during such period persuasively indicting that he was alive. In all other cases, such death shall be presumed from evidence that a person whom the person abducted would have been extremely likely to visit or communicate with during the specified period were he alive and free to do so did not see or hear from him during such period and received no reliable information during such period persuasively indicating that he was alive].

(b) Kidnapping in the first degree is punishable as a class A felony [unless the death sentence is imposed as provided by section 53a-46. When the court and the state's attorney consent, a person indicted for kidnapping in the first degree may plead guilty thereto, in which case the court shall sentence him as for a class A felony].

Sec. 6. Section 53a-25 of the 1969 supplement to the general statutes is repealed and the following is substituted in lieu thereof: (a) Any offense for which a person may be sentenced to a term of imprisonment in excess of one year is a felony.

(b) Felonies are classified for the purposes of sentence as follows: (1) Class A, (2) class B, (3) class C, (4) class D [and], (5) unclassified AND (6) CAPITAL FELONIES FOR WHICH THE SENTENCE OF DEATH MAY BE IMPOSED AS PROVIDED IN SECTIONS 3 AND 4 OF THIS ACT.

(c) The particular classification of each felony defined in this chapter is expressly designated in the section defining it. Any offense defined in any other section of the general statutes which, by virtue of any expressly specified sentence, is within the definition set forth in subsection (a) shall be deemed an unclassified felony.

Sec. 7. Subsection (b) of section 53a-28 of the 1971 noncumulative supplement to the general statutes is repealed and the following is substituted in lieu thereof: Except as provided in sections 53a-45, [53a-46,] 3 AND 4 OF THIS ACT AND 53a-92 [and 53a-93], when a person is convicted of an offense, the court shall impose one of the following sentences: (1) A term of imprisonment; or (2) a sentence authorized by section 18-73 or 18-75; or (3) a fine; or (4) a term of imprisonment and a fine; or (5) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a period of probation or a period of conditional discharge; or (6) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a fine and a period of probation, or a period of conditional discharge; or (7) a fine and a sentence authorized by section 18-73 or 18-75; or (8) a sentence of unconditional discharge.

Sec. 8. Subsection (b) of section 53a-35 of the 1971 noncumulative supplement to the general statutes is repealed and the following is substituted in lieu thereof: The maximum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows: (1) For a class A felony, life imprisonment [unless a sentence of death is imposed in accordance with section 53a-46]; (2) for a class B felony, a term not to exceed twenty years; (3) for a class C felony, a term not to exceed ten years; (4) for a class D felony, a term not to exceed five years; (5) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime; AND (6) FOR A CAPITAL FELONY, LIFE IMPRISONMENT UNLESS A SENTENCE OF DEATH IS IMPOSED IN ACCORDANCE WITH SECTION 4 OF THIS ACT.

Sec. 9. Section 53a-55 of the 1969 supplement to the general statutes is repealed and the following is substituted in lieu thereof: (a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in [subdivision (1) of] subsection (a) of section [53a-54] 2 OF THIS ACT, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

(b) Manslaughter in the first degree is a class B felony.

Sec. 10. Section 19-480a of the 1971 supplement to the general statutes, as amended by section 25 of number 278 of the public acts of 1972, is repealed and the following is substituted in lieu thereof: Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any hallucinogenic substance, amphetamine-type substance or narcotic substance or more than one kilogram of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of [his arrest] SUCH ACTION, a drug-dependent person, for a first offense, shall be imprisoned not less than ten years nor more than twenty years; and, for a second offense, shall be imprisoned not less than fifteen nor more than thirty years; and for any subsequent offense shall be imprisoned for thirty-five years, PROVIDED, FOR A SECOND OR SUBSEQUENT CONVICTION OF THE SALE OF HEROIN, COCAINE OR METHADONE, THE PENALTY SHALL BE LIFE IMPRISONMENT.

Sec. 11. Subdivision (4) of section 1 of number 278 of the public acts of 1972 is repealed and the following is substituted in lieu thereof: "Amphetamine-type [drugs] SUBSTANCES" include amphetamine, optical isomers thereof, salts of amphetamine and its isomers, and chemical compounds which are similar thereto in chemical structure or which are similar thereto in physiological effect, and which show a like potential for abuse, which are controlled substances under this chapter unless modified.

Sec. 12. Subdivision (7) of said section 1 is repealed and the following is substituted in lieu thereof: "Cannabis-type [drugs] SUBSTANCES" include all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such a plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or resin; but shall not include the mature stalks

of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination. Included are cannabinon, cannabinol and chemical compounds which are similar to cannabinon or cannabinol in chemical structure or which are similar thereto in physiological effect, and which show a like potential for abuse, which are controlled substances under this chapter unless modified.

Sec. 13. Subsection (23) of said section 1 is repealed and the following is substituted in lieu thereof: "Hallucinogenic [drugs] SUBSTANCES" are psychodysleptic substances which assert a confusional or disorganizing effect upon mental processes or behavior and mimic acute psychotic disturbances. Exemplary of such drugs are mescaline, peyote, psilocyn and d-lysergic acid diethylamide, which are controlled substances under this chapter unless modified.

Sec. 14. Subsection (30) of said section 1 is repealed and the following is substituted in lieu thereof: "Narcotic [drug] SUBSTANCE" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: (A) Morphine type: (I) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate which are similar thereto in chemical structure or which are similar thereto in physiological effect and which show a like potential for abuse, which are controlled substances under this chapter unless modified; (ii) any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (i), but not including the isoquinoline alkaloids of opium; (iii) opium poppy and poppy straw; (B) cocaine type,

coca leaves and any salt, compound, derivative or preparation of coca leaves and any salt, compound, isomer, derivatives or preparation thereof which is chemically equivalent or identical with any of these substances or which are similar thereto in physiological effect and which show a like potential for abuse, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecqonine.

Sec. 15. Sections 53a-46, 53a-54 and 53a-93 of the general statutes are repealed.

Approved May 4, 1973

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SUPREME COURT, U.S.

No. 06-52

IN THE

Supreme Court of the United States

MICHAEL SKAKEL,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition for a Writ Of Certiorari to the Supreme Court of Connecticut

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The ruling below can be sustained only if a state supreme court has the power to apply retroactively new interpretations of criminal statutes—no matter how radical, unexpected and indefensible the change from prior decisions—to revive time-barred prosecutions, convert misdemeanors to felonies or increase minimum or maximum penalties. In fact, the State concedes *only one* limit would survive; judges could not broaden the range of conduct made unlawful. This Court has never embraced such a dramatic limitation on the scope of the Due Process Clause. To the contrary, the decisions in *Bouie*, *Rogers*, *Marks* and *Stogner* all lead to the inescapable conclusion that the Due Process Clause is violated when a state court revives a time-barred prosecution.

Perhaps recognizing the difficulties with its position on the merits, the State argues that the federal question was not timely raised in state court. To the contrary, petitioner raised the due process claim immediately after it first arose. The violation occurred in the opinion affirming petitioner's conviction; that is, when the Connecticut Supreme Court overruled its prior unanimous decisions, radically changed its interpretation of the reach of the 1976 law, and then applied that new interpretation to him. Under this Court's cases, petitioner properly preserved his claim in these circumstances.

The State also posits that petitioner's conviction might have been upheld on the alternate ground that there *never* was any statute of limitations for petitioner's offense. The desperate implausibility of this counter-textual assertion—which would require the conclusion that "capital felony" means felonies *not* punishable by death—perhaps best explains why a majority of the Supreme Court of Connecticut elected to overrule two of its unanimous decisions rather than to embrace it. This Court's practice of occasionally postponing the resolution of federal questions has no place where the state court, *in the very case giving rise to the petition*, was squarely presented with the alternate state law basis for affirming, but instead *went out of its way* to create the federal

question. It would be a peculiar rule, to put it mildly, that permits a state court to insulate a due process challenge to *its* actions by expressly reserving for another day a state law question that might have averted the violation. When this Court decides the federal question in petitioner's favor, the state court will have ample opportunity to address the state-law argument, and—if that argument is found to have any merit—whether, as a matter of federal law, the Due Process Clause prevents the State from applying *that* new interpretation of the law to petitioner. There is no reason to abstain from reaching the significant question raised by the petition.

I. PETITIONER'S FEDERAL QUESTION WAS TIMELY RAISED ON REHEARING BECAUSE HE HAD NO DUE PROCESS CLAIM UNTIL, IN AFFIRMING HIS CONVICTION, THE STATE SUPREME COURT OVERRULED TWO CASES AND APPLIED THE NEW RULE TO HIM

Until the opinion affirming petitioner's conviction, the law of Connecticut—firmly established in two unanimous decisions by the final arbiter of such law—was that its 1976 statute rescinding the limitations period for non-capital murder did not apply to conduct pre-dating the statute. The State argues review should be denied because petitioner never raised his due process claim in the trial court, waiting until after the Connecticut Supreme Court changed the law by overruling those two decisions. Petitioner's duty, however, was merely to preserve the claim he now makes, not to demonstrate clairvoyance. Because the federal question arose when the state supreme court rendered its decision in *this* case, that issue was timely raised in a motion for rehearing.

There is no authority for the State's novel proposition that a petitioner must anticipate and preemptively address any federal claims that might arise if a state supreme court unexpectedly abandons binding precedent. The Court's cases are squarely to the contrary. "[W]hen the act complained of is the act of the [state] Supreme Court, done unexpectedly at

the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for the infraction of constitutional rights if the party aggrieved in such a way could not come here." *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) (defendant not "bound to ask a ruling or to take other precautions in advance"); *see also Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 677 (1930) (federal claim timely raised on rehearing; "[n]o one doubted the authority of the *Laclede* case until it was expressly overruled in the case at bar").

The State asserts petitioner nonetheless "had an opportunity to anticipate and assert the federal question in his reply brief" because he "was on notice" from the State's brief and decisions by the Connecticut Supreme Court that *Paradise* "was under siege and ripe for reconsideration." Opp. at 12. There are three independent flaws in this argument.

First, the federal question does not arise solely from the court's decision to overrule prior cases. There would have been no due process violation if the court had announced a new default rule of statutory interpretation and applied it *prospectively* only. The court went one step further, however, and applied the new rule *retroactively*. The State has identified no precedent that would have led petitioner to anticipate that second step, which is the basis for the due process claim.

Second, although a party must anticipate that an *open* issue of state law may be decided against him, there is no such requirement where the state court has already ruled on the issue. The Court drew this very distinction in *Brinkerhoff-Faris*, *supra*. "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own." 281 U.S. at 682 n.9; *see also Herndon v. Georgia*, 295 U.S. 441, 444-45 (1935) (expressing "no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated," but "several months prior to the action of the trial court" the state court had decided a case in which it "in sub-

stance construed the statute as it did in the present case"); *id.* at 446 (appellant was obligated "to anticipate the probability of a similar ruling in his own case"). It is particularly inappropriate to fault petitioner for not anticipating the upheaval of settled law where it involved statutory interpretation. *See Herald Publ'g Co. v. Bill*, 111 A.2d 4, 8-9 (Conn. 1955) (holding it "especially true when the precedent involved concerns the interpretation or construction of a statute" that *stare decisis* counsels against overruling an earlier decision "unless the most cogent reasons and inescapable logic require it").

Finally, this case could not possibly fall within a proposed rule requiring parties to anticipate the overruling of particularly unstable precedent. The cases cited by the State in no way signaled that the court was moving in the direction of overruling *Paradise* and *Crowell*. In fact, to the extent the court addressed those two unanimous decisions in the later cases cited by the State, *see* Opp. at 11-12, it embraced their holdings and the underlying legal analysis. *See State v. Parra*, 741 A.2d 902, 906-07 (Conn. 1999) (retroactively applying shorter time limit for motions to vacate judgments; "[w]e agree with the defendant that *Paradise* created a *bright line rule* on 'matters involving the statutory construction of criminal statutes'"—a rule that is confined to "certain types of criminal statutes, such as a statute of limitations for the prosecution of a crime[.]" (emphasis added)); *see also In re Daniel H.*, 678 A.2d 462, 468 (Conn. 1996) (rejecting retroactive application of statute eliminating immediate appeals of transfers to adult court; "In fact, we recently have rejected an argument analogous to the argument made by the state in the present case. See *State v. Crowell*[.]") The other cases cited by the State are even less helpful; they *pre-date Crowell*, the case in which the State had *already* sought to overrule *Paradise*. *See* Opp. at 12 (citing cases decided in 1985 and 1986).[1]

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[1] The State argued for overruling *Paradise* and *Crowell*, in passing, in three paragraphs tacked to the end of its limitations argument. By then, it had defaulted on this alternate ground: under state law the "appellee shall file a preliminary statement of issues" within twenty days of appellant's

Parties in the various state courts are not, and should not be, required to populate their trial and appellate pleadings with federal questions that might conceivably arise in the event a part of the universe of binding state court precedent applicable to the case at hand is overturned. Petitioner's due process challenge is properly before this Court.

II. ABSTENTION ON STATE LAW GROUNDS IS INAPPROPRIATE BECAUSE THE STATE COURT HAD AMPLE OPPORTUNITY TO AVOID THE FEDERAL QUESTION

The State argues that "it remains an open and debatable question under Connecticut law" whether there was a limitations period for non-capital murder in 1975. Opp. at 16. Abstention might be appropriate in cases where the state court was deprived of the opportunity to render a federal question moot by clarifying state law. It is *not* appropriate where the state court went to the greatest lengths imaginable—overruling two unanimous decisions and retroactively applying the new interpretation of a statute to the petitioner—to *avoid* resolving a question of state law.

In 1975, Connecticut law provided that "[m]urder is punishable as a class A felony unless it is a capital felony and the death penalty is imposed as provided in section 53a-46a." Conn. Gen. Stat. § 53a-54a. The State has never suggested that Moxley's murder was a capital felony; the opinion below conclusively stated otherwise. Pet. App. 33a n.32. Class A felonies were subject to a five-year limitations period. Conn. Gen. Stat. § 54-193 (Rev. to 1975).[2] The State argues that

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[Footnote continued from previous page]

statement if it wishes to "present for review alternate grounds upon which the judgment may be affirmed." Conn. Practice Book Rule 63-4(a)(1); Pet. App. 298a (petitioner's preliminary statement of issues; see attached). The State filed *no* statement of issues, let alone one identifying the alternate basis for ruling that the prosecution was not time-barred.

[2] Because the statute mentioned no period for offenses punishable by death, the state supreme court has held that "capital prosecutions" may be

because the opinion below purported to reserve the question whether five years for offenses punishable by imprisonment really meant five years, this Court should abstain from deciding if that court violated his due process rights.

The State relies on dicta in *Harman v. Forssenius*, 380 U.S. 528 (1965), suggesting that "abstention may be proper" where "resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law[.]" *Id.* at 534. The Court upheld the federal district court's decision not to *postpone* its exercise of jurisdiction until the state court had been "afforded a reasonable opportunity to pass on underlying issues of state law and to construe the statutes involved." *Id.* This Court need not decide whether *Harman*'s rationale—that the state statutes were unambiguous—applies here too, *see id.* at 535; the state court was "afforded a reasonable opportunity" to decide this case on the "alternate" ground.

Apart from the untimely and abbreviated discussion at the end of the State's argument in its brief to the state supreme court, the attention of the parties was *fully* devoted to the very state law issue now cited by the State. The supreme court hardly viewed this as a question that it should answer to avoid deciding whether the 1976 statute could be applied to petitioner. The majority was so skeptical of its ability to resolve the case on this ground that it took the extraordinary step of overruling two prior unanimous decisions—the settled state law for more than twenty years—to avoid it.

This Court need not try to predict how the Connecticut court would resolve the issue identified by the State. If this

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prosecuted at any time. *See State v. Ellis*, 497 A.2d 974, 987 (Conn. 1985) (allowing *Paradise* defendants to be charged with capital murder after non-capital murder charges were time-barred). The *Ellis* court stressed the distinction between "murder" and "capital felony." *Id.* at 993 ("Murder and capital felony do not contain the same statutory elements, . . . they do not carry the same punishment, and under the law of this case, they are not subject to the same limitation period on prosecution.")

Court reverses petitioner's conviction, there will be time enough for the Connecticut court to consider whether, as a matter of state law, the statutes in effect in 1975 contained a five-year limitations period for non-capital murder. And, if the answer to that question is no, the court will also be able to decide, with appropriate guidance from this Court, whether the Due Process Clause permits such an interpretation to be applied here in light of the clear statement in *Paradise* that the law in effect before 1976 "provided for a five-year period of limitations on all felony offenses." 456 A.2d at 307.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS ON AN ISSUE OF GREAT IMPORTANCE

The State's defense of the court's ruling confirms its significant breadth and only further emphasizes the need for this Court's review. The State does not dispute that had the court been addressing elements of a criminal offense, its action here—overruling two of its own unanimous decisions, each of which had conclusively interpreted the statute in a materially different way, and then applying the new interpretation retroactively—would violate due process. The *sole* way to uphold the lower court's ruling is to engraft an "only the elements of the offense" limitation on the due process protections applied in *Bouie* and subsequent cases decided by this and other courts. But those cases cannot and should not be read so narrowly. This Court's review is needed to correct Connecticut's misguided approach.

The State correctly observes that constraints imposed on the judiciary under the Due Process Clause are more narrow than ex post facto restraints imposed on the legislature. *See Rogers*, 532 U.S. at 459-60 (noting "important institutional and contextual differences" between legislation and judicial decisions). But those constraints on retroactive criminal law changes are narrower only insofar as needed to allow "evolution" of the common law. *Id.* at 461. That need is fully addressed by holdings that judicial interpretations comply with due process so long as they are not "unexpected and indefen-

sible" by reference to the law which had been expressed at the earlier time in question. *Id.* (holding that "this limitation adequately serves the common law context as well"). Thus, while the judicial branch is afforded the latitude to make changes that promote measured evolution of the common law, the two clauses apply with equal breadth where, as here, the change is unexpected and indefensible.

None of the cited cases intimates—much less holds—that an accused's due process rights, including fair notice, extend "solely" to "the criminality of his contemplated conduct." Opp. at 20. The State simply assumes such a limitation because the Court's earlier cases presented the issue in that particular context. But careful review of the leading cases confirms that the Due Process Clause protects against changes in the law such as those reviving time-barred prosecutions. *Bouie* itself made clear that the Fourteenth Amendment's protections against unexpected changes in the criminal law extend beyond the definition of the offense. 378 U.S. at 354 ("[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law"). In *Rogers*, the Court proclaimed that "the more basic and general principle of fair warning" is the touchstone of *Bouie*. 532 U.S. at 459. When a State revives a time-barred prosecution, it cuts to the very core of this fair warning protection. *See Stogner*, 539 U.S. at 611 (a State acts "unfair[ly] and dishonest[ly]" when it prosecutes after it has "assured a man that he has become safe from its pursuit"; this "depriv[es] the defendant of the 'fair warning,' that might have led him to preserve exculpatory evidence" (internal quotation marks and citations omitted)).[3]

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[3] Cases from two federal circuits also explicitly recognize that due process protections are not confined to the scope of criminal conduct under the statute defining the crime. *See, e.g.*, *Helton v. Fauver*, 930 F.2d 1040, 1044-47 (3d Cir. 1991) (Due Process Clause prevents state court from reading "and" to mean "or" in statute setting forth findings needed to transfer a case from juvenile to adult court); *Rubino v. Lynaugh*, 845

The State's cramped view of the law would lead to absurd results. A state court could revive a time-barred prosecution by interpreting "five years" in a statute to mean "no limitation," or by augmenting the limitations statute with the type of exception forbidden in *Stogner*. *See* 539 U.S. at 609 (State may not revive a prosecution by relying on a new law allowing cases to be brought within a year of the victim's first complaint to the police). It would also permit unexpected increases in punishment contrary to this Court's holdings. The right to "fair notice" pervades due process cases in other areas. *See, e.g., Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (rule of lenity applies where doubt exists as to severity of authorized punishment). Due process guarantees, not only of fair notice but of non-retroactivity generally, would become an empty formality if *Bouie* and related cases were read as the State urges.

Finally, the State argues that "[e]ven if one assumes . . . a person is entitled to notice" of the limitations period for an offense, Opp. at 22, because the opinion on which "petitioner stakes his claim" came eight years after the offense, his "reliance" on it is "misplaced." Opp. at 22 & 23. Not so. A new limitations period may be added to an offense *not yet* time-barred, *see* Opp. at 17-19, because a defendant's right to fair warning is violated by conduct occurring *after* the initial limitations period has expired. *See Stogner*, 539 U.S. at 611 (identifying the evils that occur when the State expands the limitations period "after" it has expired). In 1983, after the five-year limitations period had run, the State (through its highest court) assured petitioner that he was free from pursuit and need not preserve exculpatory evidence. That assurance

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F.2d 1266, 1272-73 (5th Cir. 1988) (retroactive repeal of judicial doctrine that barred multiple prosecutions of offenses "carved" from the same transaction would violate Due Process Clause because that clause ensures fair warning and also safeguards against vindictiveness and increased punishment). To the extent state courts hold otherwise, *see* Opp. at 21 n.3, it merely deepens the split in authorities warranting review.

was amplified in 1994, when the court unanimously reaffirmed *Paradise*. By haling petitioner into court seventeen years after *Paradise*, the State discarded the rules that *it* had written, deprived him of the fair warning to which he was entitled, and exposed him to a retroactive change in the law.[4] The decision below is in serious conflict with decisions of this and other courts on a question of great importance.

CONCLUSION

This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted.

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October 19, 2006

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[4] Because prejudice indisputably need not be shown, this is not the place to fully refute assertions about petitioner's incriminating admissions. Two things bear noting, however. First, many of those alleged statements were made or relayed to the authorities *after* the limitations period had run. Second, the State's disparagement of petitioner's alibi merely highlights the prejudice caused by the State's delay in charging him. *See* Pet. Br. at 5-6; *see also* Pet. App. at 219a (Andrea Shakespeare, the witness refuting petitioner's alibi, admits she read Mark Fuhrman's book about the murder and told the police she believed petitioner was not at his cousin's house at about the time the murder occurred, "because those are the tales that had been told"); Pet. App. at 4a n.6 (opinion notes Shakespeare's memory problems). This prejudice is particularly acute because no physical evidence connected petitioner to the crime.

APPENDIX I

CHIEF CLERK
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APPELLATE COURT

2002 SEP 17 P 4:58

201 CAPITOL AVENUE
HARTFORD, CT 06106

(SUPERIOR COURT NO. FST CR00-135-792-T)

STATE OF CONNECTICUT	:	APPELLATE COURT
	:	
v.	:	J.D. OF STAMFORD/NORWALK
MICHAEL SKAKEL	:	SEPTEMBER 17, 2002

DEFENDANT'S PRELIMINARY STATEMENT OF THE ISSUES

Pursuant to Section 63-4(a)(1) of the Connecticut Practice Book, the Defendant-Appellant, **MICHAEL SKAKEL**, through his undersigned counsel, wishes the following issues to be reviewed on appeal:

1. Whether the trial court erred in denying the Defendant's Motion To Dismiss since the prosecution was time barred pursuant to the Statute of Limitations that was in effect for murder in 1975?

2. Whether the juvenile court erred in transferring the Defendant's case to the adult criminal division of the Superior Court since the statutory criteria for transfer

pursuant to Conn. Gen. Stat. Section 17-60a (Rev. to 1975) were not established?

3. Whether the trial court erred in refusing to hold an evidentiary hearing and/or to order a new trial in that the defendant's constitutional and statutory rights were violated by a pattern of conduct in which the prosecution failed to disclose either in a timely fashion or not at all exculpatory information and material to the investigatory grand jury (*see* Conn. Gen. Stat. Section 54-47f(f)) and/or to the defendant, including, but not limited to, (a) the failure to disclose a composite sketch of a person seen walking near the murder scene around 9:30 p.m. or 10:00 p.m. by a security guard; (b) the Summary Profile Reports of Kenneth Littleton and Thomas Skakel prepared by the police; (c) the mid-trial disclosure of the 1976 application for an arrest warrant for Thomas Skakel; and, (d) the post-jury selection disclosure of 1992 videotaped police interviews of Kenneth Littleton?

4. Whether the trial court erred in refusing to grant a new trial since the defendant's constitutional rights were violated by the prosecutor's closing and rebuttal arguments by the improper use of "passion, prejudice or resentment" and by engaging in a pattern of deliberately misrepresenting the facts, arguing facts not in evidence, and presenting argument that was factually inaccurate?

5. Whether the trial court erred in not *sua sponte* instructing the jury on manslaughter in the first degree pursuant to Conn. Gen. Stat. Section 53a-55(a)(2), a lesser included offense of murder, following the State's closing argument in which it argued factors that would have justified a verdict for manslaughter?

6. Whether the trial court erred in not ordering a new trial since the State engaged in prosecutorial misconduct by presenting a photograph of the defendant taken in 1979 when he was almost nineteen years old

and representing that the photograph depicted the defendant in the mid-70s when he would have been fifteen years old?

7. Whether the trial court erred in admitting irrelevant and prejudicial testimony from Matthew Tucciarone and Lawrence Zicarelli, concerning alleged statements made by the defendant, which statements, during their respective proffers to the Court, were never sufficiently connected to the crime charged?

8. Whether the trial court erred in admitting damaging and prejudicial statements attributed to the Defendant by way of triple hearsay testimony through the State's witness, Mildred Ix?

9. Whether the trial court erred in its instructions to the jury by inviting the jury to disregard the testimony of the alibi defense witnesses who are family members, thereby infringing upon the Defendant's constitutional rights to present a defense and to a fair trial?

10. Whether the trial court erred in refusing to hold an evidentiary hearing and/or to order a new trial in that the State used materials protected by the attorney-client privilege and attorney work product doctrine in its investigation and prosecution of the defendant, thereby violating the defendant's rights under the due process clauses of the federal and state constitutions?

11. Whether the trial court erred in not granting the Defendant's Motion In Arrest Of Judgment since the State's failure to proceed by way of grand jury indictment violated defendant's rights under Article One, Section 8 of the Connecticut Constitution, as it existed at the time of the offense charged: the due process clauses of the federal and state constitutions; the ex post facto clauses of the federal and state constitutions; and the equal protection provisions of the state and federal constitutions?

12. Whether the trial court erred in excluding evidence relating to Kim Freehill's residency at The Elan School, which was within the scope of the State's case, as such testimony directly concerned the circumstances under which the defendant made certain statements to fellow residents at Elan thereby the defendant's state and federal constitutional rights to confrontation, to present a defense, to due process of law and to a fair trial?

13. Whether the trial court erred in admitting the prior testimony of a deceased witness since that testimony constituted inadmissible hearsay, and deprived the Defendant of his federal and state constitutional rights of confrontation, due process and a fair trial?

14. Whether the trial court erred when it *sua sponte* interrupted the defense closing argument and advised the jury to disregard portions of defense counsel's closing argument?

15. Whether the trial court erred in granting the State's request for a curative instruction, informing the jury that it had granted the request and then in instructing the jury to disregard portions of defense counsel's arguments?

16. Whether the trial court erred in its instruction in one or more of the following ways, thereby depriving the defendant of his state and federal constitutional rights to due process and a fair trial by an impartial jury: (a) by unfairly marshaling the evidence and highlighting the state's case and diminishing the defense; (b) in its instructions to the jury on consciousness of guilt, which instructions included the proposition that "the defendant's statements as to his activities and whereabouts on the night in question, if you find them to be false or materially inconsistent, might be offered because such statements tend to show a consciousness of guilt"; (c) in its instructions on motive by informing the jury that "a total lack of evidence of motive

does not necessarily raise a reasonable doubt as long as there is other evidence produced that is sufficient to prove guilt beyond a reasonable doubt"; (d) in its instructions and re-instructions to the jury on the concept of reasonable doubt; and, (e) in suggesting to the jury that in its deliberations, the jury would be determining the guilt or the innocence of the defendant as opposed to determining whether the State has proven each and every element of the crime charged beyond a reasonable doubt?

17. Whether the trial court erred in denying the defendant's motion to excuse a juror on the grounds of flagrant juror misconduct?

18. Whether the trial court erred in not holding an evidentiary hearing and/or in not granting a new trial based on the post-trial comments of one or more jurors, which suggest that the jury had difficulty following all of the Court's instructions?

19. Whether the trial court erred in admitting eighteen police and autopsy photographs of the victim which were cumulative and used to shock the jury's conscience, thereby infringing upon the defendant's state and federal constitutional rights to due process and a fair trial?

20. Whether the trial court erred in admitting irrelevant and highly prejudicial hearsay evidence from the diary of the victim?

21. Whether the trial court erred in admitting the tape-recorded conversation between the Defendant and Richard Hoffman, which contained inadmissible hearsay as well as irrelevant and prejudicial evidence of the defendant's prior misconduct?

22. Whether the trial court erred in denying the defendant's motions for judgment of acquittal?

23. Whether the trial court erred in denying the Defendant's Motion In Arrest Of Judgment?

24. Whether the trial court improperly imposed a sentence based upon improper considerations, including the Defendant's state and federal constitutional right to remain silent?

25. Whether the 1975 indeterminate sentencing scheme violates the separation of powers provisions of the Connecticut Constitution by giving the Board of Parole the unfettered discretion of determining the Defendant's period of incarceration?

26. Whether the trial court's imposition of an indeterminate sentence of twenty years to life – which means a life sentence – for the actions of a minor constitutes cruel and unusual punishment under the state and federal constitutions?

27. The Defendant hereby reserves the right to raise any further issues which may become evident upon a review of the trial transcript The undersigned counsel did not represent the Defendant at the trial proceedings and has not yet received the complete transcript.

THE DEFENDANT,
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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing Preliminary Statement Of The Issues has been mailed postage prepaid this 17th day of September, 2002 to the following counsel of record:

Susann Gill, Esq.
Judicial District of Fairfield
1061 Main Street
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/s/
HOPE C. SEELEY

(3)

No. 06-52

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SUPREME COURT, U.S.

In The

Supreme Court Of The United States

MICHAEL SKAKEL,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF CONNECTICUT CRIMINAL DEFENSE LAYWERS ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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ACADEMIC JOURNALS

Heyward D. Armstrong, Rogers v. Tennessee: An Assault on Legality and Due Process, 81 N.C. L.Rev. 317 (Dec., 2002).....12

"Democratic Despotism" And Constitutional Constraint: An Empirical Analysis Of Ex Post Facto Claims In State Courts, 12 Wm. & Mary Bill of Rts. J. 439 (February, 2004).....16

Ex Post Facto Excepted: Rogers v. Tennessee And The Permissible Retroactive Application Of Judge Made Law, 71 U. Cin. L. Rev. 1141 (Spring, 2003).....11,12

Jerome Hall, *Nulla Poena Sine Lege*, 47 Yale L.J. 165 (1937).....13

Trevor Morrison, Fair Warning And The Retroactive Judicial Expansions Of Federal Criminal Statutes, 745 Cal. L.R. 455 (2001).....13,14

The Supreme Court – Leading Cases, 115 Harvard L.R. 306 (2001).....14

BOOKS

Wayne R. LaFave, Substantive Criminal Law (2d ed. 2003).....14

Herbert L. Packer, The Limits of the Criminal Sanction (1968).....12

INTEREST OF AMICUS CURIAE[1]

The organization submitting this brief is the Connecticut Criminal Defense Lawyers Association (CCDLA), P.O. Box 1766, Waterbury, CT 06721-1766.

CCDLA is a not-for-profit organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut. An affiliate of the National Association Of Criminal Defense Lawyers, CCDLA works to improve the criminal justice system by, inter alia, insuring that the individual rights guaranteed by the Connecticut and United States Constitutions are applied fairly and equally and that those rights are not diminished. CCDLA has a strong interest in this case because the Connecticut Supreme Court, in reversing two of its prior decisions, violated due process as expressed in Stogner v. California, 539 U.S. 607 (2003), Rogers v. Tennessee, 532 U.S. 451 (2001) and Bouie v. City of Columbia, 378 U.S. 347 (1964).

CCDLA seeks amicus curiae status because the question of law is a question of great public importance. As framed by the petitioner, that question is: "*whether a State violates the Due Process Clause of the Fourteenth Amendment when its highest court unexpectedly overrules its own binding interpretation of one of its statutes in order to authorize a criminal prosecution that the passage of time had*

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[1] Amicus curiae files this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amicus Curiae, their members, or their counsel made a monetary contribution for the preparation or submission of this brief to the United States Supreme Court.

previously barred." (Petitioner's Pet. p. i.)

STATEMENT OF FACTS

The Connecticut Supreme Court succinctly summarized the facts of the underlying 1975 crime and the eventual prosecution of the petitioner 25 years later.

> "On October 31, 1975, fifteen year old Martha Moxley was found bludgeoned to death in a wooded area on the grounds near her family home in Greenwich. No one was charged in connection with her murder until twenty-five years later, when the defendant, Michael Skakel, a fifteen year old neighbor of the victim at the time of her death, was arrested and charged with the crime. The case initially was brought in the Superior Court for Juvenile Matters and, thereafter, transferred to the regular criminal docket of the Superior Court. Thereafter, the case was tried to a jury, which found him guilty of murder in violation of General Statutes (Rev. to 1975) §53a-54a(a). The trial court rendered judgment in accordance with the jury verdict, from which the defendant appealed." State v. Skakel, 276 Conn. 633 at 639 (2006).

On January 24, 2006, the Connecticut Supreme Court affirmed the petitioner's conviction. Id.

One of the issues on appeal was whether the trial court "improperly concluded that his prosecution for murder was not barred by the applicable statute of limitations." (Id. at 663.)

That statute was Connecticut General Statute §54-193.[2] The Connecticut Supreme Court noted that the trial court, referring to State v. Paradise, 189 Conn. 346, 456 A.2d 305 (1983)

> "recognized that, in Paradise, we ultimately had determined, *on facts materially identical to the facts of the present case*, that the prosecution of the defendants for murder in that case was barred by the five year limitation period of the pre-1976 amendment version of §54-193, the same version of §54-193 that was in effect at the time of the murder of the victim in the present case." (Skakel at 664, emphasis added.)

The trial court had held that the five year statute of limitations period described in C.G.S. §54-193 "was inapplicable to the crime of murder." (Skakel at 665.) The Connecticut Supreme Court instead relied on Public Act 76-35 §1 which amended C.G.S. §54-193. That amendment stated in relevant part that "[t]here shall be no limitation of time within which a person may be prosecuted for a capital felony or a class A felony." (Skakel at 668, citing P.A. 76-35 §1.)

The Connecticut Supreme Court reversed its decisions in State v. Paradise, 189 Conn. 346 (1983) and State v. Crowell,

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[2] C.G.S. (Rev. to 1975) §54-193 states in relevant part: "No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the punishment is or may be imprisonment in the Connecticut Correctional Institution, Somers, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the Connecticut Correctional Institution, Somers, but within one year next after the offense has been committed."

228 Conn. 393 (1994), holding

> "Because there is no indication that the legislature intended that P.A. 76-35, §1, was to have prospective effect only, that amendment, contrary to our conclusion in Paradise, applies retroactively to crimes that were committed before its effective date but for which the preamendment limitation period had not yet expired. Consequently, P.A. 76-35, §1, applies to the October, 1975 murder of the victim." Id. at 693.

The petitioner filed a motion for reconsideration and reargument. In that motion the petitioner represented that:

> "The Court's determination that this prosecution was not time-barred by the applicable statute of limitations is based upon an analysis different than that of the trial court. Skakel, 276 Conn. at 663. The trial court concluded that the instant murder prosecution was not subject to the statute of limitations set forth in Section 54-193 (Rev. to 1975) because murder historically was considered a grave offense to which the statute of limitations was never intended to apply. The retroactive application of the 1976 amendment to the statute of limitations was *never* argued or presented by the State to the trial court. In fact, in its Memorandum In Opposition To Motion To Dismiss filed on May 30, 2001, the State conceded that it could *not* rely on a claim for retroactive application of the 1976 amendment, and it *never* argued that Paradise should be

> reversed. See State's Memorandum In Opposition To Motion To Dismiss, Appendix at A1.
>
> Thus, Mr. Skakel's brief-in-chief to this Court solely addressed the trial court's analysis and argued that the trial court misread this court's established precedent, and disregarded the historical difference between capital murder (murder in the first degree, which was never time-barred) and non-capital murder (murder in the second degree, which was time-barred). For sixteen pages, the State's brief to this Court also focused on the trial court's finding that there never was a statute of limitations for murder. Then, in one page at the end of its argument, the State alternatively requested this Court to overrule Paradise. See State's Brief, at 11-27.... Mr. Skakel responded to the State's new claim in three-quarters of a page of his 25-page reply brief. Although this Court then overruled long-standing precedent and issued a lengthy opinion addressing the retroactivity of the 1976 amendment, it did so without the benefit of either party's analysis on the issue." (Petitioner's Motion For Reconsideration And Reargument dated February 14, 2006, fn1, pp. 3–4, emphasis in the original.)

The Connecticut Supreme Court denied the petitioner's motion.

The amicus curiae otherwise relies on and adopts the statement of facts articulated by the petitioner in his petition.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted because the Connecticut Supreme Court did not apply the holding of Bouie v. City of Columbia, 378 U.S. 347 (1964). Bouie held that if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" it must not be applied retroactively. Id. at 354. The retroactive application of Public Act 76-35 §1 to enable the prosecution of the petitioner is unexpected and indefensible. It conflicts with this Court's decision in Rogers v. Tennessee, 532 U.S. 451 (2001). It also violates the principle of legality and the fair warning doctrine.

ARGUMENT

This Court stated in Bouie v. City of Columbia, 378 U.S. 347 at 354 (1964) that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law." Such an enlargement is thus forbidden. In 1983 in State v. Paradise, the Connecticut Supreme Court held that C.G.S. §54-193 was penal in nature and therefore had to be strictly construed. Paradise, supra, 189 Conn. at 352, 456 A.2d 305. Thus this statute could not be applied retroactively. Id. at 352. In the instant case, the Connecticut Supreme Court observed that, "because criminal statutes of limitation do not define criminal conduct, establish the punishment to be imposed or otherwise burden defendants, such statutes are not truly penal at all." Id. at 676. Hence, "[c]ontrary to our determination in Paradise, §54-193, like other criminal statutes of limitation, is *remedial* in nature." Id. at 677. Citing Toussie v. United States, 397 U.S. 112, 114-15 (1970) it was stated that "because of the remedial nature of criminal statutes of limitation they 'are to be liberally

interpreted in favor of repose.'" Skakel at 677 citing Toussie, supra at 115. The Supreme Court of Connecticut then noted that "in Paradise, the rule of strict construction provided the sole basis for our determination that P.A. 76-35, §1, has prospective effect only." Id. at 679. The Connecticut Supreme Court then overruled Paradise.

In the instant matter, instead of affording P.A. 76-35 §1 a strict and therefore prospective construction, the exact opposite construction was applied:

> "We conclude, therefore, that an amendment to a criminal statute of limitations applies to a crime committed prior to the enactment of the amendment, in the absence of a clear expression of legislative intent to the contrary, as long as the preamendment limitation period had not yet expired when the amendment became effective. Because there is no indication that the legislature intended that P.A. 76-35, §1, was to have prospective effect only, that amendment, contrary to our conclusion in Paradise, applies retroactively to crimes that were committed before its effective date but for which the preamendment limitation period had not yet expired. Consequently, P.A. 76-35, §1, applies to the October, 1975 murder of the victim." Skakel at 693.

Supreme Court precedent teaches that criminal statutes of limitations are to be liberally interpreted in favor of the accused. Toussie v. United States, supra, 397 U.S. 112 (1970) stands for this, notwithstanding Connecticut's interpretation of this decision. Generally applied, statutes must be construed to

only have a prospective effect, unless a state legislature, by express terms of the statute, indicates that a statute is to apply retroactively. Hassett v. Welch, 303 U.S. 303 (1938). In Goshen v. Stonington, 4 Conn. 209 at 223 (1822), the Connecticut Supreme Court of Errors stated that "a statute is not to be construed as having a retrospect.... Such a construction ought never to be given, unless the expression of the law imperiously requires it." Id. In more modern times, the Connecticut Supreme Court has held that a statute that changes existing law cannot be applied retroactively unless it is clearly so intended by the legislature. State v. Magnano, 204 Conn. 259, 278 (1987). Indeed, regarding both civil and criminal statutes, the Connecticut Supreme Court noted in State v. Lizotte, 200 Conn. 734, 740-41 (1986):

> "While we have noted the continued vitality and utility of the principle that procedural statutes will be applied retroactively absent contrary legislative intent; State v. Paradise, 189 Conn. 346, 351, 456 A.2d 305 (1983); we consistently have expressed reluctance to construe statutes retroactively where the statutes affect substantial changes in the law, unless the legislative intent clearly and unequivocally appears otherwise. State v. Paradise, supra, 350-51; Hunter v. Hunter, 177 Conn. 327, 331, 416 A.2d 1201 (1979); American Masons' Supply Co. v. F.W. Brown Co., 174 Conn. 219, 222-23, 384 A.2d 378 (1978); East Village Associates, Inc. v. Monroe, 173 Conn. 328, 332, 377 A.2d 1092 (1977); State ex rel. Rundbaken v. Watrous, 135 Conn. 638, 648, 68 A.2d 289 (1949)." Id.

For many decades, Connecticut has had a statute that

specifically prohibits retroactivity relative to "any new obligation." It is Connecticut General Statute §55-3.[3] It was noted in Anderson Consulting v. Gavin, 255 Conn. 498 at 517 (2001) that the Connecticut Supreme Court had

> "uniformly interpreted §55-3 as a rule of *presumed* legislative intent that statutes affecting *substantive* rights shall apply prospectively only. Coley v. Camden Associates, Inc., 243 Conn. 311, 316, 702 A.2d 1180 (1997). This presumption in favor of prospective applicability, however, may be rebutted when the legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively." Id.

Public Act 76-35 §1 speaks for itself and there is no expressed language intending retroactivity. In Skakel, the Connecticut Supreme Court did more than overrule State v. Paradise, 189 Conn. 346 (1983) and State v. Crowell, 228 Conn. 393 (1994) which were directly on point. It essentially employed a statutory construction at odds with 200 years of state precedent.[4]

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[3]C.G.S. §55-3 states: "Limitation of effect of certain acts. No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect." Id.

[4] This is not ameliorated by declaring in 2006 that the statute was procedural and not substantive. This specific question was not addressed in Paradise because there was no need to reach it. The fact that the statute had no "language clearly necessitating" a retrospective construction controlled. Id. at 353. It was noted that the application of the general civil doctrine that procedural statutes "will be applied retrospectively absent a contrary legislative intent" "in the criminal realm is limited.

Such a retroactive construction is in conflict with Bouie and with Rogers v. Tennessee, 532 U.S. 451 (2001) and violates the petitioner's due process rights. As is well known, in 1964 this Court held in Bouie that ex post facto limitations operate through the Due Process Clause to judicial interpretation of criminal statutes. "If a state legislature is barred by the Ex Post Facto Clause from passing [an ex post facto] law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." 378 U.S. 347 at 353-54. In 2001, this Court expanded this constitutional principle to judge-made constructions of a state's common law rules of criminal law in Rogers, supra. The constitutional test of a Due Process Clause violation, as the petitioner correctly notes:

> "is whether it construes the law in a manner that is '"unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue[.]"' Bouie, 378 U.S. at 354. This formulation provides courts with the needed flexibility to ensure that the law may evolve, *see* Rogers, 532 U.S. at 462, while at the same time ensuring fundamental fairness, including the requirement that the prosecution and punishment of particular conduct be foreseeable. *See* Rogers, 532 U.S. at 461-62; Marks, 430 U.S. at 191-92; Bouie, 378 U.S. at 354. A judicial ruling that is unexpected and indefensible by reference to the status quo ante deprives a defendant of those protections. Bouie, 378 U.S. at 354." (Pet. p. 15.)

Indeed, the law in Connecticut has long been to the contrary." Id. at 351.

After the Tennessee Supreme Court retroactively changed its common law "year and a day" rule in order to sustain Rogers' murder conviction, this Court affirmed the decision on grounds that doing so was predictable, i.e. not unexpected and indefensible. The majority opinion declared that employing ex post facto protections to Rogers would "unduly impair the incremental and reasonable development of precedent" (Id. at 452) and that a fair warning analysis applied. In short, because so many other states' jurisdictions had previously abolished this common law rule it was held that Rogers had been fairly warned.

The petitioner rightfully points out that the Connecticut Supreme Court's decision "was anything but a 'routine exercise of common law decisionmaking' that brought the law into conformity with reason and common sense." (Pet. p. 23.) Skakel involves turning 23 years of Connecticut Supreme Court precedent on its head, to the detriment of the petitioner. In Rogers, Bouie was distinguished because Bouie dealt with the "meaning of the words of a particular statute" rather than the "continuing viability of a common law rule." Rogers, 532 U.S. at 464. Thus Rogers does not have to be overruled for the petitioner to obtain relief from this Court. Bouie involved the meaning of a criminal statute and the instant matter involves the meaning of the Connecticut criminal statute. Accordingly, Bouie has more applicability than Rogers.[5]

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[5] One scholar has opined that in Rogers,

"the Court failed on two levels: first, it failed to convincingly circumnavigate the Bouie precedent, and second, it failed to provide a convincing rationale for the holding of the case. The opinion has initially escaped notice, but the potential ramifications of the decision are staggering, considering the volume of law many people assume is constitutional or legislative that is in fact judge made law." Ex Post Facto

Amicus curiae directs the Court's attention to the principle of legality.

> "The principle of legality, which encompasses the maxims *nullum crimen sine lege* and *nulla poena sine lege*, requires that 'no one may be convicted of or punished for an offense unless the conduct constituting the offense has been authoritatively defined by an institution having the duly allocated competence to do so.'"[6]

The principle of legality, as a term of art, means that "conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal."[7] And, "[i]mplicit in this principle is a prohibition against the retroactive application of criminal laws." Id. Professor Packer notes that the above-quoted Latin maxims "have a constitutional counterpart," namely, "the explicit prohibition of Article I, section 9, clause 3, that no Bill of Attainder or ex post facto Law shall be passed."[8] It is submitted that although the

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Excepted: Rogers v. Tennessee And The Permissible Retroactive Application Of Judge Made Law, 71 U. Cin. L. Rev. 1141 at 1165 (Spring, 2003).

Regardless if this is so, Rogers does not deprive the petitioner from constitutional relief.

[6] Herbert L. Packer, The Limits of the Criminal Sanction, p. 72 (1968), cited in fn10, The Supreme Court – Leading Cases, 115 Harvard L.R. (2001).

[7] Rogers v. Tennessee: An Assault on Legality and Due Process, 81 N.C. L.Rev. 317 at 321-22 (Dec., 2002).

[8] Packer, loc cit, p. 72.

principle of legality embraces and includes the "explicit prohibition" that Article I, Section 9, clause 3 and Article I, section 10 address, it embodies broader and older judicial doctrines as well, fair warning and stare decisis.[9]

This Court in Bouie recognized that

> "[t]here can be no doubt that a definition of the right of fair warning can result not only from vague statutory language but *also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language*." 378 U.S. at 352 (emphasis added).

Certainly the Connecticut Supreme Court overruling its own precedent in Skakel was unforeseeable and constitutes "retroactive judicial expansion" of a statute that the state's highest court had expressly held could not be applied retroactively.

This Court in United States v. Lanier, 520 U.S. 259 (1997) further explained that due process prevents courts from imposing a novel construction of a criminal statute "to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." Id., 266. Such a rationale illustrates the essence of the fair warning requirement. Apart

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[9] The maxims are also quoted together as one maxim, "*nullum crimen sine lege, nulla poena sine lege*." Professor Jerome Hall translated this as, "no crime without law, no punishment without law." *Nulla Poena Sine Lege*, 47 Yale L.J. 165 (1937). One commentator observes: "known as the principle of legality, this maxim 'has for centuries been the basic *sine qua non* of criminal justice.'" Fair Warning And The Retroactive Judicial Expansions of Federal Criminal Statutes, 745 Cal. L.R. 455 at 462 (2001).

from ex post facto considerations, relative to the doctrine of fair warning, the petitioner received no warning at all, much less fair warning. In the treatise Substantive Criminal Law §2.4(c) (2d ed. 2003), Professor LaFave addresses the ramifications of precedent being overruled.

> "Perhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision, which, if applied to the defendant's case, would result in his acquittal...." (Id.)

In such situations, the overruling decision cannot be applied retroactively. Id. This is basically what happened to the petitioner. Returning to ex post facto law, such overruling of prior precedent has been labeled "the most severe kind of 'unexpected and undefensible' change in the law." 115 Harvard L.R. 306, n.65 (2001).

In Lanier, this Court recognized three manifestations of the fair warning doctrine relative to judicial retroactivity. They are the void-for-vagueness doctrine, the rule of lenity, and what commentator Trevor Morrison calls the "rule of nonretroactivity".[10] He notes that "this rule of nonretroactivity" "provides that once a court has decided to interpret a statute a certain way, the court may not apply that interpretation retroactively if the text of the statute, *or prior constructions of it, did not fairly disclose the possibility that the statute could be*

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[10] Fair Warning And The Retroactive Judicial Expansions of Federal Criminal Statutes, 745 Cal. L.R. 455 at 469 (2001).

read that way."[11]

The principle of legality and the fair warning doctrine embodied in it and manifested in Lanier, require that this Court grant the extraordinary relief the petitioner requests.

It is important to note that Stogner v. California, 539 U.S. 607 (2003) and the Ex Post Facto Clause have independent significance to the petitioner's cause. In Stogner, certiorari was granted to answer the question of whether a California statute which revived a criminal prosecution previously time-barred by a prior statute, violated the Ex Post Facto Clause. In holding that the statute did violate the Ex Post Facto Clause, it was determined that the subject statute fell within the second of four "categorical descriptions of *ex post facto* laws." Id. at 607. The landmark case of Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) and Justice Chase's four categories of ex post facto laws were referred to. It was held that the "second Calder category" which proscribes "every law that aggravates a crime, or makes it greater than it was when committed" controlled. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). Three reasons were expressed supporting this holding. First, quoting Carmell v. Texas, 529 U.S. 513, 533 (2000), "the government has refused 'to play by its own rules.'" Stogner, 539 U.S. at 611. Thus, Stogner did not receive "fair warning." Id. at 611. Second, under Justice Chase's "alternative description" of ex post facto laws, i.e. "[a]t other times they inflicted punishments, where the party was not, by law, liable to any punishment" – covered Stogner's situation because before the statutory change he was not "liable to any punishment." Id. at 613. Third, it was held that there is a "well settled" view that the Clause prevents law allowing the revival

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[11] Id. at 469 (emphasis added).

of time-barred prosecutions. Id. at 607.

The petitioner's situation is different from that in Stogner because in Stogner, the original statute of limitations had expired years before the legislature enacted the statute that Stogner was prosecuted under and in the case at bar, the 1976 public act was enacted within the 5 year limitation period of the 1975 statute. However, in Stogner there was not a prior state supreme court decision directly on point, declaring that the new statute did not and could not be applied retroactively to the date of the crime. Thus, the rationale of Stogner should nevertheless apply to the petitioner's case.

This Court's decision in Stogner has been praised by constitutional scholars:

> "The Court's recent decisions in Carmell and Stogner appear to signal a new determination that the judiciary seek to ensure that the government play 'by its rules' in the criminal justice arena, despite the compelling social and political reasons favoring retroactive application of criminal laws. In so doing, the Court, albeit in both cases by a five-to-four vote with distinctly different majorities, heeded its own critically important admonition that the applicability of a particular constitutional provision should turn on the 'reasons' it was included in the Constitution and 'the evils it was designed to eliminate.'"[12]

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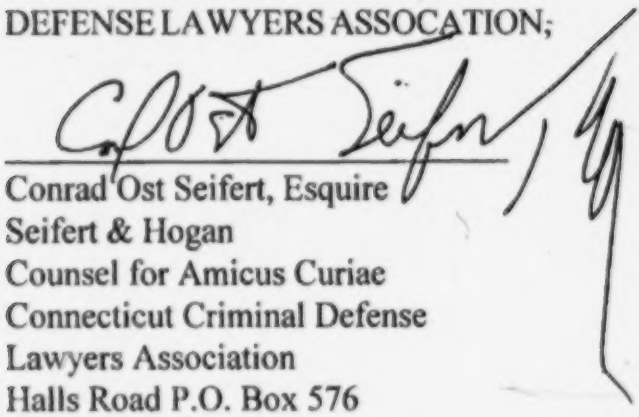
[12] "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis Of Ex Post Facto Claims In State Courts, 12 Wm. & Mary Bill of Rts. J. 439 at 508 (February, 2004).

CONCLUSION

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." Lynce v. Mathis, 519 U.S. 433, 439 (1997). When the Connecticut Supreme Court decided State v. Paradise in 1983 and upheld Paradise, supra, in State v. Crowell in 1994, it had full awareness of the importance of this "essential thread." Indeed, in the concluding sentences of State v. Paradise the justices recognized that there would be "far reaching ramifications" which would "directly affect a number of unsolved class A felonies." Id. at 353. Yet, the court did not break this essential constitutional thread. It was recently noted in Hamdan v. Rumsfeld, 126 S. Ct. 2749, fn34 (2006) that, "[w]hile the common law necessarily is 'evolutionary in nature'... an act does not become a crime without its foundations having been firmly established in precedent.... This is so because the law-making function of the courts must remain within reasonable limits.". Id. In overruling State v. Paradise and State v. Crowell and in applying the new rule of law retroactively, the Connecticut Supreme Court exceeded reasonable constitutional limits, broke the essential constitutional thread and deprived the petitioner of fair warning. Certiorari should be ordered granted not only to correct the constitutional rights violation the petitioner has endured but also to set the fair warning doctrine back on its appropriate historical course.

RESPECTFULLY SUBMITTED:
THE CONNECTICUT CRIMINAL
DEFENSE LAWYERS ASSOCATION;



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